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A TREATISE
ON THE
LAW OF DAMAGES,

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW,

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT.

BY J. G. SUTHERLAND.

VOL. II.

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PART II.

THE LAW OF DAMAGES

AS

APPLIED TO VARIOUS CONTRACTS AND WRONGS.

CHAPTER I.

BONDS AND PENAL OBLIGATIONS.

SECTION 1.

PENALTIES.

Bonds and penalties—Penalties in affirmative agreements—Statutes of 8 and 9 William III—Statutes of 4 and 5 Anne—American statutes and practice—Statutory bonds—Impossible conditions—Penalty the limit of recovery.

BONDS AND PENALTIES.—A bond is a form of obligation under seal, by which the party making it, called the obligor, acknowledges himself bound to the other party, called the obligee, in a specified sum. If accompanied by no other agreement or condition, it evidences an absolute debt, and no question of penalty ordinarily arises. In that form it is called a single bond. When a condition of defeasance is added, the sum stated in the bond is called a penalty; for it is usually much larger in amount than the value of the thing specified to be done in the condition which shows the real nature of the contract and contains its essence.¹ There is no express agreement on the part of the obligor to perform such a condition; but he has thereby made the obligation subject to be discharged by performance of the act or acts which the condition specifies. Literally, the obligor, by the terms of the instrument, says he is absolutely obliged to pay the penalty, unless he fulfils the condition. Such was

¹Sedg. on Dam. *483.

formerly his legal obligation. On failure to perform the condition, the penalty became an absolute debt, and, at law, was recoverable. In equity, however, it was treated as security for performance of the condition; and relief was granted against the enforcement of the penalty, on payment of a sum as damages, ascertained to be an equitable equivalent of the condition not performed; in other words, that court would not allow the obligee to take more than in conscience he ought.¹

PENALTIES IN AFFIRMATIVE AGREEMENTS.—Penalties are also often agreed to be paid in agreements and covenants, in the event of a breach of affirmative stipulations. In such cases, the party injured is not confined to his action for the penalty; but has an election to sue on the agreement or covenant. In that action he is entitled to recover full damages without regard to the penalty. It is not the measure of damages, nor does it limit the recovery of damages, if the actual injury require a larger amount for just compensation.² He may sue for the penalty, and when he does so, the recovery is governed substantially by the same principles as when the action is upon a bond. By the early common law, in either case, if by the terms of the condition of defeasance, or the agreement, the penalty became forfeited, it might be recovered; after which, there could be no further recovery upon the obligation; because, by recovery of the penalty, the whole was satisfied.³

STATUTES OF 8 AND 9 WILLIAM III.—It was provided, however, by statute, enacted in 1697 in England, in substance, that in all actions in courts of record upon any bond or on any penal sum for the non-performance of any covenants or agreements in any indenture, deed or writing contained, the plaintiff might assign as many breaches as he saw fit; and the jury, upon the trial, might assess not only the usual damages and costs, but also

¹ Black. Com. Book II, p. 241; Hale v. Thomas, 1 Vern. 509; Bishop v. Church, 2 Ves. 371; Hobson v. Trevor, 2 P. Wms. 191; Cannel v. Buckle, 2 P. Wms. 243; Collins v. Collins, 2 Burr. 820; Chilliner v. Chilliner, 2 Ves. 528. See *Bonaferes v. Rybot*, 3 Burr. 1370.

² *Lowe v. Piers*, 4 Burr. 2225; *Noyes v. Phillips*, 60 N. Y. 408; *Thompson v. Rose*, 8 Cowen, 266; *Strobel v. Large*, 3 McCord. 112; *Haggart v. Morgan*, 4 Sandford, 198.

³ *Id.*

damages for such of the breaches assigned as the plaintiff should prove. The ordinary judgment was to be entered on the verdict; and when given for the plaintiff on demurrer, by confession or *nil dicit*, he might suggest breaches on the roll; and upon writ of inquiry, prove the breaches and recover damages; upon the defendant's paying either upon execution or into court, the damages assessed with costs, further execution upon the judgment was to be stayed; but the judgment remained as a security to answer further breaches which might again be suggested on *scire facias*, when a similar trial and proceeding were required.¹ The assignment of breaches under this statute were held compulsory, because the statute was made for defendants, and was highly remedial, while it secured to the obligee all he in conscience ought to receive.² This statute was held to extend to all bonds and deeds for the performance of covenants, or payment of money, which were of a divisible nature, and capable of partial breach or a succession of breaches; or from the violation of which only part of the damages guarded against might arise.³ It includes, therefore, bonds for the payment of money by instalments;⁴ for the payment of an annuity;⁵ for the performance of an award;⁶ and where a bond is conditioned for the payment of a single sum, and also for the performance of other covenants, breaches must be assigned, though the action is merely brought to recover the single sum, for which purpose it is like the common money bond;⁷ for in all such cases, as the plaintiff would have been entitled at law to issue execution to the full amount of his judgment, the defendant would have been forced to an expensive remedy in equity.⁸

STATUTE OF 4 AND 5 ANNE.—Another statute was passed soon afterwards, providing for relief at law against penalties in money bonds conditioned for the payment of a lesser sum at a time

¹ 8 and 9 Will. III, ch. 11, § 8.

² Roles v. Rosewell, 5 T. R. 538; Hardy v. Bern, 5 T. R. 636; Van Benthuysen v. DeWitt, 4 John. 213; Hodges v. Saffert, 2 John. Ca. 406.

³ Wood's Mayne on Dam. 338.

⁴ Willoughby v. Swinton, 6 East, 530; Harrington v. Coxe, 3 Ir. C. L.

87; Hodgkinson v. Wyatt. 1 D. & L.; Randall v. Burton, 23 Upper Canada, C. P. 268.

⁵ Walcott v. Golding, 8 T. R. 126; Ryan v. Massey, 2 Ir. C. L. 642.

⁶ Welch v. Ireland, 6 East, 613.

⁷ Quin v. King, 1 M. & W. 42.

⁸ Wood's Mayne on Dam. 338.

certain. By this statute it was provided that where an action is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators, have, before action, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition and defeasance, and had been so pleaded. It also provided that if, at any time pending an action upon any such bond with a penalty, the defendant brings into court where the action is depending all the principal money and interest due thereon, and also all such costs as have been expended in any suit at law or in equity, upon such bond, the money so brought in shall be deemed and taken to be in full satisfaction and discharge of the bond, and the court shall and may give judgment to discharge the defendant from the same accordingly.¹ This act applies wherever a single sum is, by the condition, payable at a certain time; or is contingently so payable, after the contingency has happened. Thus, it is held to apply to post obit bonds;² to bonds for payment of interest and principal, where both have become due;³ even though the money became payable in consequence of certain provisions in an indenture of even date; provided, that by the course of pleading, the jury have found that the money had become payable;⁴ to bonds for payment of principal and interest, with proviso, that on default in paying the interest maturing before the principal, the whole amount of principal and interest should become due.⁵

AMERICAN STATUTES AND PRACTICE.—Similar statutes have been enacted in this country. They are not all precisely the

¹ 4 and 5 Anne, ch. 16, §§ 12, 13. See act of 1860, 23 and 24 Vic. ch. 26, § 25.

² Murray v. Earl of Stair, 2 B. & C. 82; Cordozo v. Hardy, 2 B. Moore, 220.

³ Smith v. Bond, 10 Bing. 125; 2 D. & L. 46.

⁴ Smith v. Bond, 10 Bing. 125; 2 D. & L. 460; Derbyshire v. Butler, 5 B. Moore, 198.

⁵ James v. Thomas, 5 B. & Ad. 40; Husband v. Davis, 10 C. B. 645; Marriage v. Marriage, 1 C. B. 761.

same, nor has precisely the same practice been adopted. They accomplish, however, the same purpose; they avoid the necessity of resort to equity for relief from the penalty on paying or suffering recovery for such damages as are a just compensation for non-performance of the condition, not exceeding the penalty. In most cases falling within the provisions of the statute of William, special breaches are required to be assigned, and either successive recoveries are allowed for successive breaches, or else upon any breach of the condition, full damages are assessed, once for all, as upon a total breach.¹

¹Waldo v. Forbes, 1 Mass. 10; Gardner v. Niles, 16 Me. 279; Burbank v. Berry, 23 Me. 483; Gennings v. Norton, 35 Me. 308; Whitney v. Slayton, 40 Me. 224; Philbrook v. Burgess, 52 Me. 271; Sibley v. Rider, 54 Me. 463; Fales v. Hemenway, 64 Me. 373; Webb v. Webb, 16 Vt. 636; Clammer v. State, 9 Gill, 279; Dale v. Moulton, 2 John. Ca. 205; Rozenkrantz v. Durling, 5 Dutch. 191; Moore v. Fenwick, 1 Gil. (Va.) 214; Clark v. Goodwin, 1 Blackf. 73; Mitchell v. Porter, 3 Blackf. 499; Rauney v. Governor, 4 Blackf. 2; Nelson v. Gray, 2 G. Greene (Ia.), 397; Cameron v. Boyle, 2 G. Greene (Ia.), 154; Spalding v. Millard, 17 Wend. 331; Harmon v. Dedrick, 3 Barb. 192; Hughes v. Smith, 5 John. 168; Munro v. Allaire, 2 Caines, 320; Van Benthuyssen v. De Witt, 4 John. 213; Allen v. Watson, 16 John. 205; Nelson v. Bostwick, 5 Hill, 37; Hodges v. Suffett, 2 John. Ca. 406; Patterson v. Parker, 2 Hill, 598; Taxbury v. Miller, 15 John. 311; Rogers v. Coleman, 3 Cow. 62; Smith v. Jansen, 8 John. 111; Caverly v. Nichols, 4 John. 189; Cook v. Tousey, 3 Wend. 444; Shaffer v. Lee, 8 Barb. 412; Turner v. Hadden, 62 Barb. 490; Sprague v. Seymour, 15 John. 474; Farnham v. Mallory, 3 Keyes, 527; Western Bank v. Sherwood, 29 Barb. 383; Howard v. Farley, 18 Abb. Pr. 260; 19 id. 126; 3 Rob. 308; O'Connor v. Such, 9 Bosw. 318; Van Wyck v. Montrose, 12 John. 350; Browne v. Hallett, 1 Caines, 517; Ryerson v. Minton, 3 Edw. Ch. 382; Wood v. Wood, 3 Wend. 454; Clark v. State, 7 Blackf. 570; Karch v. Commonwealth, 3 Pa. St. 369; State v. Lawson, 2 Gill, 62; State v. McAlpin, 6 Ired. 347; Black v. Caruthers, 6 Humph. 87; People v. McHatton, 1 Gilman, 731; Armstrong v. State, 7 Blackf. 81; Hinkley v. West, 4 Gilman, 136; Scarborough v. Thornton, 9 Pa. St. 451; Arnold v. Commonwealth, 8 B. Mon. 109; Sims v. Harris, 8 B. Mon. 55; Ray v. Justices, 6 Ga. 303; State v. Votow, 8 Blackf. 2; Walcott v. Harris, 1 R. I. 404; Toles v. Cole, 11 Ill. 562; Fleming v. Tolee, 7 Gratt. 310; Cameron v. Boyle, 2 Greene (Ia.), 154; Clammer v. State, 2 Gil. 279; Scott v. State, 2 Md. 284; Governor v. Wiley, 14 Ala. 172; Garnett v. Yoe, 17 Ala. 74; Garrett v. Logan, 19 Ala. 344; Wilson v. Contrel, 19 Ala. 642; Trice v. Turrentine, 13 Ired. 212; James v. State, 3 Md. 211; Young v. Reynolds, 4 Md. 375; Rubon v. Stephan, 25 Miss. 253; Mitchell v. Laurens, 7 Rich. 109; Witmore v. Rice, 1 Bissell, 237; State v. Ford, 5 Blackf. 393; Richman v. Richman, 5 Halst. 114; Dent v. Davison, 52 Ill. 109.

Under the code, it has been intimated that breaches should in all cases be assigned; because the cause of action is required to be stated in ordinary and concise language.¹ In some states, an action of debt may be brought on a money bond as soon as there is any default in the payment of interest or instalment of the principal;² in others, not until all the moneys payable by the condition are due.³ In Arkansas, debt will not lie until all the instalments are due, but covenant may be brought when one becomes due.⁴

By the general practice, judgment is rendered for the penalty; but it is only nominally the debt; the breach of the condition is treated as the gist of the action.⁵ Where damages are assessed upon particular breaches, the judgment for the penalty is to be enforced only to the extent of such damages.⁶ If such a judgment be sued on in another state, the damages which had been assessed for the breaches is the measure of recovery.⁷ Though in the court where originally rendered it stands as security for further breaches, they cannot be assigned when the judgment is sued on in another jurisdiction.⁸

If a bond is accompanied by a condition to do an illegal act,

¹ *The Western Bank v. Sherwood*, 29 Barb. 383.

² *Dupuy v. Gray*, 1 Ala. 357; *Thatcher v. Taylor*, 3 Munf. 249; *Galbreith v. O'Bannon*, Sneed (Ky.), 61; *Nailor v. Kearney*, 1 Cranch C. C. 112; *Davidson v. Brown*, 1 Cranch C. C. 250.

³ *Booth v. Hall*, 6 Md. 1; *Peyton v. Harmon*, 22 Gratt. 643. See *Platt on Cov't*, 545.

⁴ *State v. Scroggin*, 10 Ark. 326.

⁵ *Murphy v. Sommerville*, 7 Ill. 360. In *Wilson v. Spencer*, 11 Gratt. 261, the judgment was rendered for the damages assessed instead of the penalty. It was held that the judgment was not entered in proper form; yet, as the error produced no injury to the defendant, the judgment should not be reversed. *Pate v. Spotts*, 6 Munf. 394. Compare *Wales v. Bogue*, 31 Ill. 464; *Scar-*

borough v. Martin, 9 Pa. St. 451; *State v. Cross*, 6 Ind. 387.

⁶ *Van Wyck v. Montrose*, 12 John. 350.

⁷ *Batley v. Holbrook*, 11 Gray, 212.

⁸ *Id.* In *People v. Campher*, 14 Ill. 447, a judgment was obtained by the people on an official bond against the sheriff and his sureties, for the penalty, in the circuit court of Sangamon county, and it was held that a subsequent assignment of breaches was not a distinct action, but was to be regarded as part of the original suit; and, therefore, the fact that the defendants resided in different counties from where the judgment was rendered, and were served with notice of such subsequent assignments of breaches in the county where they resided, did not oust the court of jurisdiction.

it is void; but if the condition is illegal in part only, and that part severable, perhaps only void *pro tanto*.¹

STATUTORY BONDS.—A statutory bond has been held vitiated by the omission of a material condition required by the statute.² The principle is well settled, that official bonds are valid if the condition substantially complies with the requirements of the statute. The exact form prescribed is not essential unless made so by the charter or act.³ Courts do not favor technical objections to such bonds, and when not strictly in compliance with the statute, they have been sustained as voluntary bonds, the conditions of which secure performance of official duty and contain nothing contrary to law.⁴

¹Greenwood v. Colcock, 2 Bay, 67; Brown v. Gitchell, 11 Mass. 11; Lowrey v. Barney, 2 Chip. 11; Kavanaugh v. Saunders, 8 Greenlf. 422; State v. Findley, 10 Ohio, 51.

²Dixon v. U. S. 1 Brock. 177. See Justices v. Wynn, Dudley (Ga.), 22. As to the effect of taking a statutory bond with a larger penalty or a severer condition than that prescribed, see also Commonwealth v. Lamb, 1 W. & S. 261; Woods v. State, 10 Mo. 698; People v. Carbannes, 20 Cal. 525.

If the conditions of a bond are not all sustainable, those which are good, if separable from the others, may be the subject of an action in case of a breach. States v. Mora, 97 U. S. 413. See States v. Hodson, 10 Wall. 395; Speck v. Commonwealth, 3 W. & S. 324; U. S. v. Gordon, 1 Brock. 190; S. C. 7 Cranch, 287; Kavanaugh v. Saunders, 8 Greenlf. 422; Hall v. Cushing, 9 Pick. 404; Sanders v. Rives, 1 Stew. 109; U. S. v. Morgan, 3 Wash. C. C. 10; U. S. v. Tingey, 5 Pet. 129; U. S. v. Brown, Gilpin, 155; Vroom v. Smith, 2 Green, 479.

Where there is a discrepancy between the condition and the penal

portion of the bond, it will be held single, and the obligee entitled to the whole amount. But to support the condition, the court will transpose or reject insensible words, and construe it according to the obvious intention of the parties. Swain v. Graves, 8 Cal. 549. See 1 Saund. 66; Ld. Raym. 68; 7 J. J. Marsh. 193.

³Dill. on Municipal Corp. § 155; Alleghany County v. Van Campen, 3 Wend. 49; People v. Holmes, 2 Wend. 281; id. 615; Fellows v. Gilman, 4 Wend. 414; Lawton v. Erwin, 9 Wend. 233; Cornell v. Barnes, 7 Hill, 35.

⁴Dill. on M. Corp. § 155; Mathews v. Lee, 25 Miss. 417; State v. Thomas, 17 Mo. 503; Postmaster General v. Rice, Gilpin, 551; Davison v. Burgess, 31 Ohio St. 78; Bagley v. Chandler, 9 Ala. 770; Montville v. Haughton, 7 Conn. 543; Stephens v. Crawford, 3 Kelly, 499; S. C. 1 Kelly, 574; Commonwealth v. Wolbert, 6 Binney, 292; Governor v. Allen, 8 Humph. 176; Gathwright v. Callaway, 10 Mo. 663; Thomas v. White, 12 Mass. 369; id. 314; Kavanaugh v. Saunders, 8 Greenlf. 442; Sweetzer v. Hay, 2 Gray, 49; Supervisors v. Coffinbury,

IMPOSSIBLE CONDITION.—If the condition be impossible when the bond is made, or becomes so afterwards, by the act of God, or of the law, or the obligee, the penalty is saved; and the bond in the one case is void, and in other is discharged.¹ But a bond for the performance of covenants is not discharged by the condition becoming impossible by the death of the obligor. In a South Carolina case, involving this point, the court say: “Although the rule of law formerly was that the penalty was saved, and the performance of the condition excused in such an event; yet, in equity, the condition was enforced as an agreement; and, if specific execution were impracticable, a compensation in damages, to be ascertained by an issue at law, was awarded to the obligee. And since the courts of law have been authorized by statute to assess the damages actually sustained in an action for the penalty, they may maintain original jurisdiction in those cases where equity would have granted relief, by directing an issue at law.”²

1 Mich. 355; Horn v. Whittier, 6 N. H. 88; State v. Perkins, 10 Ired. 333; Dalton v. Miami Tribe No. 1, 2 Am. L. Record (Ohio), 329; People v. Johr, 22 Mich. 461; Inferior Co. v. Ennis, 5 Ga. 569; McCroskey v. Riggs, 12 S. & M. 712. Compare Tucker v. Hart, 23 Miss. 548; Stevens v. Hay, 6 Cush. 229; Crawford v. Meredith, 6 Ga. 552; Supervisors v. Jones, 19 Wis. 51; Scarborough v. Parker, 53 Me. 254; Governor v. Mattack, 2 Hawks, 366; Johnson v. Gwathmey, 2 Bibb, 186; Stevens v. Treasurer, 2 McCord, 107; Treasurer v. Butis, 2 Bailey, 262; Grimes v. Butler, 1 Bibb, 192; Williamson v. Wolf, 1 Ala. Sel. Ca. 296; Cross v. Gabeau, 1 Bailey, 211; Postmaster General v. Rice, Gilpin, 554; U. S. v. Tingey, 5 Pet. 115; Montville v. Haughton, 7 Conn. 543; Morrell v. Sylvester, 1 Greenlf. 248; Smith v. Crocker, 5 Mass. 538; Commonwealth v. Wolbert, 6 Binn. 292; State v. Bowman, 10 Ohio, 445; Goodman

v. Carroll, 2 Humph. 490; Lord v. Lancey, 8 Shepl. 468.

¹Hanks v. Pickett, 27 Tex. 97; Scully v. Kirkpatrick, 79 Pa. St. 324; Thornborow v. Whitacre, 2 Ld. Raym. 1164; People v. Bartlett, 3 Hill, 570; Barker v. Hodgson, 3 M. & S. 267; Brown v. London (Mayor, etc.), 9 C. B. N. S. 726; White v. Mann, 26 Me. 211; Harmony v. Bingham, 2 Kern. 99; Gilpins v. Consequa, Peters' C. C. 86; Clifford v. Watts, L. R. 5 C. P. 577; Ward v. Syme, 8 N. Y. Leg. Obs. 95. See 1 Saund. 66; Wild v. Harris, 7 C. B. 1005; Milward v. Littlewood, 20 L. J. Ex. 2; Brewster v. Kitchell, 1 Salk. 198; Warren v. Powers, 5 Conn. 381; Jones v. Howard, 9 C. B. 19; Appleby v. Meyers, L. R. 2 C. P. 651; Taylor v. Caldwell, 2 B. & S. 826; Boast v. Ferth, L. R. 4 C. P. 1. But see Irion v. Hume, 50 Miss. 419.

²Miller v. Nichols, 1 Bailey, 226. See White v. Mann, 26 Me. 361; Allen v. State, 6 Blackf. 252.

PENALTY THE LIMIT OF RECOVERY.—The penalty is the limit of liability for breach of the condition of a bond. This proposition is universally admitted.¹ And in the case of private bonds, it is also the measure of the obligation where it is

¹ Hughes' Adm'r v. Wickliffe, 11 B. Mon. 202; Wilde v. Clarkson, 6 T. R. 203; McClure v. Dunkin, 1 East, 436; McKnight v. McLean, 3 Brown Ch. 596; Tew v. Winterton, 3 Brown Ch. 496; Woods v. Com. for Pennington, 8 B. Mon. 112; New Haven Bank v. Miles, 5 Conn. 587; Cherry's Ex'r v. Mann, Cooke (Tenn.), 269; Noyes v. Phillips, 16 Abb. N. S. 400; S. C. 60 N. Y. 419; Clark v. Bush, 3 Cow. 151; Payne v. Ellzey, 2 Wash. (Va.) 143; Hifford v. Alger, 1 Taunt. 218; Goldhawk v. Duane, 2 Wash. C. C. 323; Seamons v. White, 8 Ala. 656; Windham v. Coates, 8 Ala. 285; Perry v. Denson, 1 Greene (Iowa), 467; King v. Brewer, 19 Ind. 267. In Sweem v. State, 5 Iowa, 552, an action was brought on a bond in a penalty of \$100, conditioned to make title to land—verdict §224. The court was requested, but refused to instruct the jury that they cannot find for the plaintiff a greater amount than that specified in the bond given for, or to secure, a deed for the land. Woodward, J.: "The second instruction asked by defendant, that the plaintiff could not recover beyond the penalty of the bond, involves the question whether the plaintiff may sue in covenant on the condition of a bond. If he may thus sue, we understand all the books which treat of damages recoverable on bonds and penal obligations, to mean that he must recover without respect to the penalty. And after a pretty full examination of the subject, yet with some hesitation on the part of one of the court,

it is our opinion that an action as for covenant broken will lie upon a penal bond of the nature of the one before us. Of this character were the cases of Stewart v. Noble, 1 G. Greene, 23, and Buckmaster v. Grundy, 1 Scam. 310, in which neither counsel nor court took any exception on this ground; and, although the damages actually rendered by the jury in these cases were without the penalty, still the rule of damage laid down and maintained in one of them did not restrict them to the penalty; and the other case comes within the principle of Foley v. McKeegan, 4 Iowa, 1, the obligor having died without neglect of performance." The refusal of the instruction was held not erroneous. The judges were different when the case got to the supreme court again (10 Iowa, 374), and then Lowe, C. J., said: "If the facts set out in the petition were true, although not established, it would seem that the acts of the defendant most complained of, and the consequent damages accruing to the plaintiff, resulted from a breach of trust, which occurred before the execution and delivery of the bond sued upon; and that the penalty in the bond was agreed upon as liquidated damages, in the event the defendant should fail to obtain for plaintiff the title to the land in question; and it is more than doubtful in the case as stated, whether the plaintiff, under any circumstances, should recover more than the penalty of the bond."

In Hughes v. Wickliffe, 11 B.

founded solely on the bond.¹ But it is only where a suit is brought on the bond that this limitation is material or effective. If brought on a judgment already rendered on a bond,² or upon some distinct covenant in a bond or other obligation, the penalty is unimportant. Where a debt is secured as such by other securities besides a bond, the fact that a bond has been taken will not usually affect the remedy on the other obligations.³ If the bond debtor resorts to equity to obtain relief from legal proceedings, it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to the jurisdiction of equity, to do what was just under the circumstances, and not to reap advantage from a delay which he has compelled his adversary to undergo.⁴ So equity will carry the debt beyond the penalty where the obligee is kept out of his money by injunction, or is prevented from going on at law.⁵

Mon. 203, 9, Graham, J., said: "In nearly all, if not in all, the cases in which damages exceeding the penalty have been given, there is an express and not an implied covenant in the condition that the obligor must do or omit some particular act; and where that is the case, it is manifest, as in *Graham v. Bickham*, 4 Dall. 149, that the parties could not, and did not, intend the liability of the obligor to be limited by the penalty." *Baker v. Cornwall*, 4 Cal. 15.

¹*Spencer v. Perry*, 18 Mich. 394. See *Niven v. Jardine et al.* 23 U. C. C. P. 470. The defendant gave a bond to the plaintiff in the sum of \$45, conditioned to pay him \$45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years the plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question being raised. He then sued for the sixth year; and the question of defendant's

liability was left to the court without pleadings.

Held, that covenant clearly would not lie; but that to a declaration on the bond, the former payments, not having been paid or received in satisfaction of the penalty, could form no defense; and that the defendants, therefore, were entitled only to have satisfaction entered on payment of penalty and costs.

²*Blackmore v. Flemming*, 7 T. R. 442; *McClure v. Dunkin*, 1 East, 436.

³*Clarke v. Lord Abingdon*, 17 Ves. 106; *Mower v. Kip*, 6 Paige, 91.

⁴*Frazer v. Little*, 13 Mich. 195, per Campbell, J.; *Mackworth v. Thomas*, 5 Ves. 329; *Tew v. Winterton*, 3 Brown Ch. 489; *Knight v. McLean*, 3 Brown Ch. 496; *Hughes v. Wynne*, 1 M. & K. 20; *Clarke v. Sexton*, 6 Ves. 411; *Clark v. Lord Abingdon*, 17 Ves. 106; *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. 593; *S. C.* 3 Sim. 341; *Jendwine v. Agate*, 3 Sim. 129; *Walters v. Meredith*, 3 Y. & Coll. 264; *Hugh Andley's Case*, Hardress, 133.

⁵*Pulteney v. Warren*, 6 Ves. 93.

So where an advantage is made of the money.¹ The sole ground upon which relief has been denied to the obligee of a money bond beyond the amount of the penalty in equity is, that at law the bond creditor is only entitled to the penalty of the bond; and where the creditor comes into equity for a legal demand, equity will give the same relief as he would have been entitled to at law.²

¹Lord Dunsany v. Plunkett, 2 Bro. P. C. 251.

²Long, Adm'r, v. Long, 16 N. J. Eq. 59; Grosvenor v. Cook, 1 Dick. 208; Hale v. Thomas, 1 Vernon, 349; Mackworth v. Thomas, 5 Ves. 330. In Long, Adm'r, v. Long, supra, Chancellor Green discusses the anomalies of our jurisprudence relating to bonds with great learning and vigor. He says: "At law the penalty of the bond has always been considered the debt. Originally the obligor at law was required to pay the penalty as the debt, and could only be relieved in equity by paying the principal and interest money due. Such was originally its design, and such to this day it is in form; a debt justly due to be paid, the obligation to be void only upon the performance of the condition. It is clear, said the master of the rolls, in Clarke v. Sexton, 6 Ves. 415, that both at law and in equity, the penalty is the debt, and upon this very ground it is urged that no interest can be recovered beyond the penalty. But if it be a debt, and if that debt become due, as it clearly does at law (in form at least), upon the breach of the condition, and judgment may be entered upon it, why may not interest be reckoned either upon the principal specified in the condition, or upon the penalty, to an amount equal to the sum upon the bond? No form or principle of the law is thereby violated. It is the constant practice of courts

of law to recover interest beyond the penalty in the shape of damages; and yet the court of chancery in England, planting itself upon the rule at law, refuses to afford relief, which is both equitable and in accordance with the intention of the parties.

"The English penal bond is in form an anomaly. The bond is not given for the actual debt, but for the penal sum, with condition that if the real debt and interest are paid at maturity, the bond is satisfied. If not paid at maturity, the bond is unsatisfied, and the penal sum has become the real debt. So the courts of law held. Equity said, no: whatever may be the form, in substance the amount of the obligation is a mere penalty which the obligor shall not enforce. He is entitled only to the principal and interest of the real debt. After a long struggle, with the history of which we are all familiar, equity triumphed. What purports to be in form the real debt, is but the penalty. The form is retained; the substance is changed. But if the form of the bond and the form of the remedy upon it are anomalous, the justice meted out to the parties is still more so. Equity says to the obligee, you shall not have the sum which the obligor bound himself to pay, and which he has acknowledged to be due, because, though in form a debt, in substance it is a penalty. The sum specified in the condition, with in-

In a few cases where a bond has been given for a money demand, and the sum mentioned in the formal part and in the condition is the same, or nearly so, and that sum the actual debt, recovery has been permitted for that sum with the stipulated interest. The fact that the amount exceeded the sum so

terest, is the real debt. But the moment the real debt exceeds the penalty, and the obligee asks for the amount due, the answer is, the penalty is the debt, and you can have no more. But if the penalty is the debt, and the real debt and interest exceeds the penal sum, so that it is no longer inequitable to demand it, why shall not the obligee have interest on the penalty? Courts of law say, he shall have it in the form of damages, for the detention of the debt. Shall a court of equity hesitate to give it? The justice of the claim, and the anomalous attitude of the English courts upon the question, is thus clearly presented by Mr. Evans, in his notes to Pothier. 2 Pothier on Obl. (3d Am. ed.) 93: 'The allowing a party to have satisfaction to the extent not only of the debt which constitutes the penalty, but also of the interest on that penalty, which is the proper damages for its detention, appears to be no more than answering the claims of ordinary justice, when the non-performance of the condition is attended with circumstances that render the penalty, without such interest, an imperfect satisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect justice as is consistent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that, the case of *Holdipp and Otway*, 2 Saund. 106, is a decisive authority. By the forms of law, one shilling damages

is always awarded for the detention of the penalty, or any other debt; and these forms will be best rendered subservient to their substantial purposes by their being extended so far as may be necessary, for securing the original obligation, provided they are not extended further than is consistent with their own particular character. And this is particularly the case with respect to bonds for securing money, when the principal and interest amount to more than the formal penalty. Whilst the court restrain the legal operation of the formal instrument, in order that it may not be carried beyond the substantial purpose, on the one hand; it is very unequal justice not to allow the full extent of that operation, when it is necessary to enforce such purpose, on the other. And it is the more extraordinary, that courts of equity, which in other cases so far sacrifice the form to the substance of the transaction as to enforce the specific performance of the agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be substituted for the performance of the agreement, should so completely deviate from that practice in the instance of all others, where the real purpose of the agreement is most indisputably evident, and where the measure of justice is with the most facility ascertained. But so are the precedents; it is easier to find precedents than to investigate principles, and there is often a timid-

stated in the formal part of the bond has not been regarded.¹ The sum stated was not regarded as in the nature of a penalty; the bond was, therefore, allowed to operate as single.²

The condition of a penal bond not being an affirmative undertaking, but only at law an optional defeasance of the bond, the penalty fixes the extent of liability in case the condition is not performed. When the penalty became the actual debt under the old law, upon the forfeiture, the amount of it was the precise sum demandable, except the damages for its subsequent detention; and since the change in the law, by which only a nominal forfeiture is recognized, and recovery is practically limited to the damages actually sustained by breach of the condition, the penalty has continued to be the utmost that can be recovered; for the change was intended for the benefit of the obligor. He is entitled to be discharged from the obligation of the bond when due by paying the penalty, however much the actual damages for breach of the condition may exceed it in amount.³ But, if the actual damages exceed the penalty, it has

ity in deviating from these precedents, which are the most at variance with principles.'

. . . "I think both upon principle and upon authority, the plaintiff, in an action upon a penal bond, with condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty, in the shape of damages for the detention of the debt. This being the relief to which the plaintiff is entitled at law, it is clear that the complainant in *equity* is entitled to at least as full relief. The only difficulty, as we have seen, in the obligee's recovering in equity the full amount of principal and interest due him upon the bond, has been that the plaintiff, coming into equity to recover a legal demand, can recover no more than he would do at law. Independently, therefore, of all precedent or authority, directly upon the question, I should

hold that upon a bill in this court for the recovery of a bond debt, either upon the bond itself or a mortgage to secure the bond, the complainant may recover the full amount of principal and interest due upon the bond, though it exceeds the amount of the penalty. And this upon the ground that it is the debt justly due, and it is in accordance with the intention of the parties, and that it violates no principle of law or equity. Equity will disregard the form in which the remedy is obtained, and look alone to the substance of the transaction."

¹Fleming v. Toler, 7 Gratt. 310; U. S. v. Arnold, 1 Gall. 348; Francis v. Wilson, Ry. & Moody, 105; Lonsdale v. Church, 2 T. R. 388; Smedes v. Houghtailing, 3 Caines, 48.

²Fleming v. Toler, *supra*.

³Atwell's Adm'r v. Towles, 1 Munf.; Brongwin v. Perrott, 2 W. Black. 1190; Wild v. Clarkson, 6 T. R. 303; Clark v. Seyton, 6 Ves. 411;

been made a question whether the amount of recovery can be increased beyond the amount of the penalty by interest from the time when the penalty, or damages to an equal amount, became due.

A distinction has sometimes been made between sureties and principals, holding the penalty as absolutely the limit in respect to the former.¹ And in certain cases, interest has been allowed beyond the penalty as damages for its detention on money bonds, while the rule has been stated to exclude interest, beyond the penalty, on bonds with other collateral conditions.²

The cases which refuse interest beyond the penalty proceed on the technical ground that the penalty does not become the debt by the damages reaching an equal amount; and hence there can be no default predicated of the obligor's omission to pay it. Campbell, J., in a thoroughly considered Michigan case, pointedly remarked that "when an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never became the actual debt, except by way of forfeiture; and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases . . . from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon forfeiture, are entirely unsupported, and would probably never have been made, had not the actual debt in these cases equalled or exceeded the penal sum. As authorities, they are based upon a false assumption, and cannot be maintained on any such principle."³ The weight of American authority, however, is in favor of allowing interest as damages beyond the penalty. The penalty is the limit of liability at the time of the breach; interest is afterwards given, not on the ground of contract, but as damages for its violation; for delay of payment after the duty to pay damages for

McClure v. Dunkin, 1 East, 436; Hellen v. Ardley, 3 C. & P. 12; White v. Sealey, Doug. 49; Carter v. Thorn, 18 B. Mon. 613; Culver v. Green, 4 Hill, 570.

¹ Leggett v. Humphries, 21 How. 66; Farley v. Lawson, 5 Cow. 424; Clark v. Bush, 3 Cow. 151; Pitts v.

Tilden, 2 Mass. 118; Mower v. Kip, 6 Paige, 88; Ansley v. Mock, 8 Ala. 444; Seamons v. White, 8 Ala. 656.

² Robbins v. Long, 16 N. J. Eq. 59; Ives v. The Merchants' Bank, 12 How. U. S. 159, 164.

³ Frazer v. Little, 13 Mich. 195; State v. Sandusky, 46 Mo. 377.

breach of the condition to the amount of the penalty had attached.¹

¹*Brainard v. Jones*, 18 N. Y. 35; *Long, Adm'r, v. Long*, 16 N. J. Eq. 59; *Washington Co. Ins. Co. v. Colton*, 26 Conn. 42; *Bronsoll v. Taylor*, 1 McCord, 311; *Carter v. Thorn*, 18 B. Mon. 613; *Harris v. Clapp*, 1 Mass. 308; *Pitts v. Tilden*, 2 Mass. 118; *Waldo v. Forbes*, 1 Mass. 10, *Lyon v. Clark*, 8 N. Y. 148; *Baker v. Morris, Adm'r*, 10 Leigh, 284; *Tenants v. Gray*, 5 Munf. 494; *Roane's Adm'r v. Drummond, Adm'r*, 6 Rand. 182; *Tazwell's Ex'r v. Saunders' Ex'r*, 13 Gratt. 354; *State v. Wyllie*, 2 Strob. 114; *Bank of Brighton v. Smith*, 12 Allen, 243; *Carter v. Carter*, 4 Day, 30; *U. S. v. Arnold*, 1 Gall. 348; *Bank of U. S. v. Magill, Paine*, 169; *Marshall v. Winter*, 43 Miss. 666; *Maryland v. Wayman*, 2 Gill & J. 279; *Sillivant v. Reardon*, 5 Ark. 140; *Allen v. Grider*, 24 Ark. 271; *Frazer v. Little*, 13 Mich. 195, per *Christiancy, J.*; *Boyd v. Boyd*, 1 Watts, 365; *Potter v. Webb*, 6 Greenlf. 14; *State v. Wylie*, 2 Strobh. 113; *Hughes v. Hughes*, 54 Pa. St. 240; *Poulan v. McDewall*, 1 Bay, 490; *Judge of Probate v. Heydock*, 8 N. H. 491. See *Perrett v. Wallis*, 2 Dall. 252; *Ritchie v. Shannon*, 2 Rawle, 196; *Norris v. Pitmore*, 1 Yeates, 408. In *Tazwell's Ex'r v. Saunders' Ex'r*, supra, *Moncure, J.*, said: "I think, therefore, the true doctrine with us is, that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity, though the principal and interest exceed the penalty. The only difference between the forums being that, according to the strict rules of law, the penalty must still be considered in form as the debt, and the excess of interest can only be recovered indirectly in the shape of damages;

while equity takes no notice of the penalty, but gives a direct decree for the principal and running interest, as in other cases. Full interest should in all cases be given, though there be a penalty, and the principal and interest exceed it, wherever full interest would be given if there were no penalty. In other words, the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond." *Pettes v. Tilden*, 2 Mass. 118; *Ejectment on a mortgage*; objection to entering judgment for more than the penalty of the bond. Per curiam: "This has never been questioned, except in the case of a surety. It has been ruled so often in the case of the principal, that the point cannot now be brought in question. It rests on principles of law as well as equity."

Harris v. Clapp, 1 Mass. 308: Debt on bond to secure performance of an award, and payment within one hundred and twenty days. It was held that the award had force from acceptance by the court of common pleas and judgment upon it there; that interest on the amount of the award, which was less than the penalty, from that time, might be recovered, though exceeding the penalty. *Sedgwick, J.*, dissenting.

U. S. v. Arnold, 1 Gall. 348, *Story, J.*: "Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities is, that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." Referring to this case, *Campbell, J.*, in *Frazer v. Little*, supra, said: "Although in-

For the purpose of recovering interest beyond the penalty after breach, it does not appear to be necessary to consider the penalty the debt; it has its proper effect in limiting the amount

terest was awarded on a penalty; yet the question of such allowance was not discussed, and is not mentioned on the appeal." 9 Cranch, 104. *Mower v. Kipp*, 6 Paige, 88: Mortgage to secure \$1,650, mentioned in the condition of the bond; decree for the actual debt, which exceeded the penalty.

Smodes v. Houghtailing, 3 Caines, 48, Kent, C. J.: "Interest is recoverable beyond the penalty, but it depends on principles of law, and is not an arbitrary, ad libitum discretion in the jury." *Warner v. Thurle*, 15 Mass. 154: Suit on replevin bond; the actual damages, interest and costs amounted to more than the penalty. The court held that recovery might be had of the penalty, and interest from the commencement of the suit. It is said that no case in Massachusetts goes further than that.

Wild v. Clarkson, 6 T. R. 303: Bond of indemnity to parish against the expense of a bastard child; application to pay penalty into court in full satisfaction, allowed. *Lonsdale v. Church*, overruled. *Kenyon, C. J.*: "Suppose the plaintiff proceeds in this action, and no defense is made to it; the judgment would be for the penalty of the bond and 1s. nominal damages, for detention of the debt. But here the defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, etc., the act of parliament (8 & 9 Will. 3, c. 11, s. 8) expressly says there shall be judgment for the penalty; and that

the judgment shall stand as security for further breaches; but the obligor is not answerable, *in the whole*, beyond the amount of the penalty."

McClure v. Dunkin, 1 East, 437: Judgment rendered on a bond in Ireland; assumpsit brought on that judgment; interest upon it was included in the recovery; motion to reduce the judgment to the penalty and costs of the first judgment, based on the supposed doctrine that there can be no recovery on a bond debt for more than the penalty and costs. *Kenyon, C. J.*: "If this had been an action on the bond, the objection would have holden good; but after judgment recovered, *transit in rem judicatam*, the nature of the demand is altered; and this being an action on the judgment, it was competent for the jury to allow interest to the amount of what was due."

Lonsdale v. Church, 2 T. R. 388: Defendant was receiver of harbor dues of Whitehaven, appointed by plaintiffs, who were trustees for carrying into execution acts of parliament relating to that harbor; he entered into three bonds, 2,000*l.* each, conditioned to account to plaintiffs for all the moneys received. On being called on to account, he admitted he had 5,400*l.* in his hands. The trustees, supposing he had received interest for several parts of that sum, filed a bill for discovery, and brought three actions on the bonds. The defendant obtained a rule calling on the plaintiffs to show cause why a stay should not be granted in two of the actions on payment of the penalties into court; and why a reference should not be

of damages when the condition was broken. If the damages amounted then to the penalty, and could then have been assessed, and their collection absolutely enforced, no principle is

granted to compute the amount due for principal in the third; and why, on payment of what a master might think due, and costs, a stay should not be granted. Buller, J., allowed the payment into court in two actions, but refused a stay; he was not satisfied with the determination of *White v. Sealy* (1 Doug. 49). In *Elliot v. Davis* (Bund. 23), in an action on a bond, decree was made for the whole amount, though it exceeded the penalty. Lord Mansfield, in another case, said the penalty is mere security, and where it is not sufficient, the plaintiff may recover damages as well as penalty. Nothing can prove the principle stronger than the constant practice, where an action is brought on a bond, of giving 1s. damages. *Dewall v. Price* (2 Show. P. C. 15), debt on a bond; penalty 140*l.*; bill in chancery; reference to compute principal, interest and costs; principal 154*l.*; costs 67*l.*; decree for all.

White v. Sealy, Doug. 49: Held that sureties were not liable for more than the penalty, though the bond was given for payment of the yearly rent, nearly as large as the penalty on a twenty years' lease.

In *McKnight v. McLean*, 3 Brown Ch. 496, Buller, J., sitting in an equity cause, allowed interest beyond the penalty of a bond, but he was overruled by Lord Thurlow, who held that there could be no such allowance, and that the rule was the same in equity as at law.

Bromley's Case, 1 Atk. 75: Where a bankrupt's estate is sufficient to pay all, with a large surplus, creditors whose debts carry interest were allowed interest from the time the

computation was stopped by the commission, but such as are creditors by bond, not beyond their penalties.

Bunscombe v. Scarborough, 6 A. & El. N. S. 13: Recovery on replevin bond limited to penalty and costs. *Lonsdale v. Church* treated as overruled, and stated that *Francis v. Wilson* did not re-establish it. Doubt expressed whether 1s. damages for detention of debt in such cases is right. See *Shut v. Proctor*, 2 Marsh. 226; *Brangwine v. Parrot*, 2 Black, 1190. 1 Salk. 154: If one, by will, subjects his lands to payment of his debts, those barred by statute of limitations are to be paid; but bond debts, on which interest has overrun the penalties, held not to carry interest beyond the penalty; but if the trustee omits to pay in a reasonable time, he must pay interest after such neglect.

Heffrod v. Alger, 1 Taunt. 218: Replevin bond; Lord Mansfield, speaking of a bond to pay a smaller sum, said it is very reasonable to calculate interest on the sum secured by the condition; but when the principal and interest equal the amount of the penalty, the interest must thenceforth cease.

Hughes v. Wynne, 1 M. & K. 20: A person conveyed estates to trustees upon trust, to sell and apply the proceeds to discharge all his bond debts, together with the interest then due and to grow due to the day of payment; held, that a bond creditor was not entitled to principal and interest beyond the penalty of the bond.

Clarke v. Lord Abinger, 17 Ves. 106: Debt secured by a bond and

violated by allowing interest from that time, if the matter of the condition be such that interest would accrue from such default, had there been no penalty. Interest may properly be

mortgage, the mortgage securing not the bond in terms, but the debt. Master of the rolls: "If he sues upon the former (bond) he cannot have interest beyond the penalty; but the mortgage is to secure payment, not of the bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum is therefore differently secured by different instruments; by a penalty and by a specific lien. The creditor may resort to either; and if he resorts to the mortgage, the penalty is out of the question."

Johnes v. Johnes, 5 Taunt. 650: After judgment on a bond, affirmed, motion made for interest accruing between judgment and affirmation; refused on statute 8 & 9 Will. 3.

Grant v. Grant, 3 Sim. 340; S. C. 3 Russ. 598: Where an obligor has, by vexatious proceedings, delayed the obligee in recovering on his bond, a court of equity will decree payment of the full amount of principal and interest, although it exceeds the penalty of the bond. See *Pultney v. Warren*, 6 Ves. 79. *Jendwine v. Agate*, 3 Sim. 129: Obligees held entitled to be paid out of the assets of the deceased obligor a sum exceeding the penalty. Held, that the doctrine of equity is that, "wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount, there, notwithstanding the agreement appear in the form of a bond, with a penalty, the court will

consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty." See *Kerwan v. Blake*, 4 Brown P. C. (Toml. ed.) 532. Where an action is brought by a common informer no damages for detention of the penalty can be obtained. He has no right to the money before the action is commenced; and, therefore, it cannot be said to be detained from him. *Mayne on Dam.* 2.

But it is otherwise where the penalty is given to the party grieved. *North v. Musgrave*, 1 Roll. Abr. 574; *Frederick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibley*, id. 2489. If a defendant does not pay a penalty which is certain on demand, but forces the plaintiff to a suit, he is subject to damages for its detention. But where the penalty is uncertain, as where treble damages are given, then no damages are allowed for the detention. *North v. Wingate*, Cro. Car. 559; *Sedgwick v. Richardson*, 3 Lev. 374. In an action for a penalty against several, only one penalty can be recovered against all. Although the words are, "that every person offending contrary thereto shall forfeit to the party aggrieved for every offense," etc.; yet the meaning is that the penalty shall relate to the offense, and not to the person. *Patridge v. Emson*, Noy. 62. When a penalty is given for a continuous offense, one penalty only can be recovered. *Garret v. Messinger*, L. R. 2 C. P. 583; 36 L. J. C. P. 337; *Apothecaries Co. v. Burt*, 5 Exch. 363; 19 L. J. Exch. 334.

When a statute imposes a penalty

charged against sureties, for delay, after it became their duty to pay, as well as against the principals.¹

SECTION 2.

BONDS OF OFFICIAL DEPOSITARIES OF MONEY.

Their liability absolute for money received — Adjustment of liability between different sets of sureties — Neglect of official supervision and examination does not affect liability of sureties.

THEIR LIABILITY ABSOLUTE FOR MONEY RECEIVED.—The official bond of public officers whose duty is to receive, safely keep and faithfully disburse public moneys, is of a distinctive character, and will receive our first attention.

There is a plain line of difference running through the cases upon this subject, resulting from diverse principles which are held to govern the responsibility of such officers. Where the care and custody of public funds are so regulated by law that the specific funds received are required to be kept and accounted for, the officer is a mere agent or bailee. In other cases, no such regulations exist, and the officer is left at liberty to keep the funds according to his discretion; he is required to answer certain calls out of the money, and to pay the residue to his successor. In cases of the former class, whatever may be the form of the bond, that is, whether it be general for the faithful

of forfeiture for an act injurious to the rights of another, and the penalty is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done. Only one penalty can be recovered for doing a prohibitable or punishable act, as for removing goods from demised premises; and all who assist in the commission of the offense may be sued together. *Conley v. Palmer*, 2 Comst. 182.

Under the provisions of the New York statute of 1857, to prevent extortion by railroad companies, only one penalty of \$50, together with the excess of fare, can be recovered for all acts committed prior to the

commencement of the action. The forfeiture is not given for the satisfaction of the injury received; that is fully satisfied by a return of the sum extorted, with interest; but it is given to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the practice. A recovery can be had under this by a party who has paid the excessive fare when riding simply for the purpose of obtaining the penalty. *Fisher v. Railroad Co.* 46 N. Y. 644.

¹*Carter v. Thorn*, 18 B. Mon. 613.

performance of official duty, or special, the identical funds, officially received, belong to the public corporation for which the officer is a depositary or treasurer. And though his responsibility is not wholly regulated by the law of bailments, it is largely so. If governed entirely by the law of bailments, the funds in his hands would be at the risk of the owner, so long as the regulations for their safe keeping are strictly followed; no loss would fall upon him unless it accrued through his fault. But from motives of policy, as well as upon the terms of the statutes and the official bonds required, it seems to be settled that all official custodians of money, and their sureties, are held absolutely bound for its safe keeping, as well as to comply with any special regulations to preserve its identity.

¹ *Murry v. Shattuck*, 1 Denio, 233; *Thompson v. Board of Trustees*, 30 Ill. 99; *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112; *Ross v. Hatch*, 5 Clarke (Iowa). 149; *Inhabitants of New P. v. McEachron*, 33 N. J. L. 339; *Supervisors v. Kaime*, 39 Wis. 468.

U. S. v. Prescott, 3 How. 578. In this case, McLean, J., said: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to fraud, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part."

In *Ross v. Hatch*, *supra*, the treasurer, from whom the public funds were stolen without his fault, was exonerated because on the terms of the law in Iowa, and of his bond, he was bound only to reasonable diligence.

In *Boyden v. U. S.* 13 Wall. 17, it

is held that where the law imposes but the duty of a bailee, the officer, by giving the required official bond faithfully to discharge the duties of his office, will increase his responsibility to that of an insurer. Strong, J., said: "He would then (as a mere bailee) be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract; and this he does when he binds himself in a penal bond to perform the duties of his office without exception! There is an established difference between a duty created merely by law, and one to which is added the obligation of an express undertaking. The law does not compel to do impossibilities; but it is a settled rule, that if performance of an express engage-

Whether the identical money received is required to be kept and paid over so as to create a bailment in the strict sense, as is the case generally under statutes of the United States; or whether the money is received with no regulations to preserve its identity—the officer is held to the same absolute rule of liability.¹ In the latter case, however, the authorities are not uniform that the officer is not a bailee or agent, though he may not be required to keep and account for the specific funds received; still it is his duty to keep the public funds separate from all others, and to devote them exclusively to the public purposes for which he received them; and any deviation from this course is a breach of duty and of his official bond.² But in some of the states such officers are held as debtors for the money paid them; the title to the money officially received vests in them personally, and is, therefore, wholly at their risk;

ment becomes impossible by reason of anything accruing after the contract was made, though unforeseen by the contracting party, and not within his contract, he will not be excused. *Metcalf on Contracts*, 213; *The Harriman*, 9 Wall. 161. The rule has been applied rigidly to bonds of public officers entrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part." See *U. S. v. Prescott*, 3 How. 578; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Kuhler*, 9 Wall. 83; *State v. Harper*, 6 Ohio St. 607. It seems to the writer that if the legal duty is only the due care and fidelity of a bailee, a bond which in terms merely secures the performance of that duty does not increase it. If the bond is required by a statute, and such a condition is prescribed, the two provisions—the one defining the officer's duties, and that prescribing the

official bond—would be construed together as requiring the same thing. And if the bond is made, in the absence of a statute, pursuant to some executive regulation, the same rule would apply, for the officer could not require more than the performance of the duty imposed by law. The absolute responsibility is more satisfactorily based on the ground of public policy.

¹ *Commonwealth v. Comly*, 3 Pa. St. 372; *Muzzy v. Shattuck*, 1 Denio, 233; *Inhabitants of Hancock v. Hazard*, 12 Cush. 112; *Morbeck v. State*, 28 Ind. 86; *Halbert v. State*, 22 Ind. 128; *Inhabitants of New Providence v. McEachron*, 33 N. J. L. 339; *State v. Harper*, 6 Ohio St. 607; *U. S. v. Prescott*, 3 How. 578; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Keebler*, 9 Wall. 83; *Board of Justices v. Fennimore*, Coxe, 242; *Hayes v. Greer*, 4 Binney, 80; *Hennepin Co. v. Jones*, 18 Minn. 199; *U. S. v. Watts*, 1 New Mex. 553.

² *Supervisors v. Kaime*, 39 Wis. 463; *Freeholders v. Wilson*, 16 N. J. L. 110.

they are treated like bankers. They must account for it fairly, and meet all obligations, when presented, to the extent of the funds received; then, and only then, is there no default or breach of the condition of their official bond.³ On the death of such an officer, the funds go to his personal representatives;² and in no event can they be taken possession of specifically by his successor; or sued for by the public corporation for whose use the officer held them, in case he lends them or otherwise mis-spends them.¹ These diverse views in respect to the nature of such officers' control of the funds in their official keeping leads necessarily to other divergencies, in the apportionment of responsibility between different sets of sureties for the same person holding office for several successive terms.

³ *Perley v. County of Muskegon*, 32 Mich. 132; *Steinback v. State*, 33 Ind. 483; *Rock v. Stinger*, 36 Ind. 346; *Board of Justices v. Fennimore, Coxe*, 242; *Hayes v. Greer*, 4 Binney, 80; *Morbeck v. State*, 22 Ind. 128; *New Providence v. McEachron*, 33 N. J. L. 339.

² *Allen v. State*, 6 Blackf. 252; *Rock v. Stinger*, *supra*.

¹ *Steinback v. State*, *supra*; *Rock v. Stinger*, *supra*. In *Perley v. County of Muskegon*, *supra*, an action for money had and received was brought by the county for moneys loaned by its treasurer, and it was held it would not lie. Campbell, J., said: "There can be no middle ground between personal and official ownership of moneys. If the moneys used by Martin Perley could be treated as specifically county funds, the liability of parties receiving them would be immediate, and would not depend upon his default. They might have been sued at any time, before as well as after his accounting. . . . In law, there can be no difference between a loan to a banker and a loan to any one else. There is no rule of law which presumes one borrower without security as safer than

another. And where, as here, the deposits were promiscuous and from all sources, it would be idle to attempt to attach contract relations with the county to funds which no ingenuity could identify.

"There is not much difficulty in reaching the personal duty of the treasurer. He is bound to have money to pay liabilities as required, to the full extent of his receipts. And he is bound, when his term ends, to have the balance ready to turn over to his successor. He could not be liable to a civil action if he makes all the payments required by law to be made. He and his sureties are bound on this bond when any such failure occurs.

"And it appears reasonable that if he has, with any dishonest understanding, put money into the hands of others, which has not been returned, and which it was known could not have come from any other source, and could only have been derived from his office, and must be officially accounted for, and restored, those persons have done an injury for which they should be accountable to those whom they have injured. It may be questionable how

ADJUSTMENT OF LIABILITY BETWEEN DIFFERENT SETS OF SURETIES.—It is a universal rule, that sureties are only liable for the defaults of their principal during the term for which their bond was given, and after it was given, unless retrospective in terms; for such contracts cannot be extended by construction.¹

far the county could be regarded as directly damnified, if the sureties are responsible, or damnified beyond the deficiency in their ability. But there can be no injury where all that is borrowed has been restored. In such a case as the one suggested, the injury consists in destroying to a great extent his power to meet his obligations, and this cannot be done when he is placed again in his former position. As he is the only legal custodian of county funds, no one can be required to do more than to put them in his hands. He has a right to demand them, and he can keep them where he pleases. He is, himself, to all intents and purposes, the treasury, and bound to account for all that he receives, and no one else can supervise his action.

“But an action based on any such theory must be an action on the case, or a bill in equity, and not an action for money had and received. It can never be determined in advance, when money is lent, how far the county will be injured, or that it will be injured at all. And the action is not based on the source or identity of the particular funds which have been used. It must depend more on the state of the accounts than upon the identity of the money, and the wrong is much in the nature of a voluntary transfer of property in fraud of creditors, whereby they will be delayed or hindered, and of which the county may justly complain if actually defrauded.”

¹ U. S. v. Boyd, 15 Pet. 187; Far-

rar v. U. S. 5 Pet. 374; Patterson v. Inhabitants, etc. 38 N. J. L. 255; State v. Paul's Ex'r, 21 Mo. 51; Myers v. U. S. 1 McLean, 493; U. S. v. Spencer, 2 McLean, 405; Jeffers v. Johnson, 18 N. J. L. 332; Stone v. Seymour, 15 Wend. 19; Bryan v. U. S. 1 Black, 140; U. S. v. January, 7 Cranch, 572; U. S. v. Eckford, 1 How. 250; U. S. v. Linn, 1 How. 104; Detroit v. Weber, 29 Mich. 24; Paw Paw v. Eggleston, 25 Mich. 36; Kingston M. Ins. Co. v. Clarke, 33 Barb. 196; Peppin v. Cooper, 2 B. & A. 431; Townsend v. Everett, 4 Ala. 607; Postmaster v. Norvell, 1 Gilpin, 126; Hart v. Pittsburgh P. G. 81 Pa. St. 466; County of Mahaska v. Ingalls, 16 Iowa, 81; Miller v. Stewart, 9 Wheat. 681; Thompson v. Dickerson, 22 Iowa, 260; The Independent School Dist. v. McDonald, 39 Iowa, 564; Bissell v. Saxton, 67 N. Y. 55; Vivian v. Otis, 24 Wis. 518. When the term ends in respect to sureties. See State v. Wells, 8 Nev. 105; Placer v. Dickerson, 45 Cal. 12; Welch v. Sumner, 28 Conn. 390; Chelmsford Co. v. Demerest, 7 Gray, 1; State v. Berry, 50 Ind. 496; Riddle v. School District, 15 Kan. 163; Wappels v. Bigham, 10 Iowa, 39; People v. Alkenhead, 5 Cal. 106; Mayor, etc. v. Horn, 2 Del. 190; Rany v. Governor, 4 Blackf. 2; State v. Corey, 4 W. L. M. (Ohio) 563; State v. Bird, 2 Rich. 99; Milliken v. State, 7 Blackf. 77; Tuly v. State, 1 Cart. (Ind.) 500; Bigelow v. Bridge, 8 Mass. 275; Commissioners v. Greenwood, 1 Desaus. 450; South Carolina Society v. Johnson, 1 McCord, 41;

The doctrine is comprehensively stated by Mr. Justice Daniel in the federal supreme court. He says: "This court has settled the law to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable."¹ Where an officer is his own successor, his sureties for either term are bound for him and should be held liable precisely as though the principal had succeeded some other person, instead of being his own successor. Each set is required to ac-

South Carolina Ins. Co. v. Smith, 2 Hill, S. C. 589; Commonwealth v. Fairfax, 4 Hen. & M. 208; Governor v. Cobb, 2 Dev. 489; Alkins v. Bailey, 9 Yerg. 111; State v. Lackey, 3 Ired. (N. C.) 25; Williams v. Miller, Kirby, 189; State v. Crooks, 7 Ohio, 2 pt. 221; Munford v. Rice, 6 Munford, 81; Hughes v. Smith, 5 John. 168; Supervisors v. Kaime, 39 Wis. 468; Wennesheek Co. v. Maynard, 44 Iowa, 15; Middleton v. Colwell, 4 Bush, 392; Newman v. Metcalf, 4 Bush, 67; U. S. v. Cheeseman, 3 Sawyer, 424; Mayor, etc. of Wilmington v. Horn, 2 Harr. 190. In Brown v. Lallimore, 17 Cal. 93, L was elected treasurer of Butte county in the fall of 1857, for two years, and entered upon the duties of his office in October of that year, giving a bond, with sureties, for the faithful performance of his duties during the period for which he was elected, until the election and qualification of his successor. In 1859, the legislature extended his term to the first Monday in January, 1860; *held*, that the sureties were not responsible for the official conduct of the treasurer during the time for which the term was extended; that the legislature

had no power to extend their liability beyond the precise terms of their contract; that the provisions inserted in such bond to make the sureties liable for the discharge of official duties imposed by law subsequently to the execution of the bond, only applies to such duties as may be required to be performed during the period of liability fixed by the bond, and does not authorize an extension of that period. An ante-dated bond does not bind the sureties for the period preceding the date of the delivery, if its language is not retrospective. Hyatt v. Grover & B. S. M. Co. 41 Mich. 225. Sureties are liable for their principal's term, and for such further time as is reasonably sufficient for the election and qualification of his successor. Supervisors v. Kaime, 39 Wis. 468; Rahway v. Crowell, 40 N. J. L. 207.

¹ Jones v. U. S. 7 How. 681; Smith v. Paul's Ex'rs, 21 Mo. 51; Draffin v. Boonville, 8 Mo. 395; Todd v. Boon Co. 8 Mo. 431; State v. Smith, 26 Mo. 226; Drury v. Drury, 36 Mo. 281; State v. Atherton, 40 Mo. 209; Welch v. Seymour, 18 Conn. 387; Rochester v. Randell, 105 Mass. 295.

count for all the public money that came to his hands during their term.¹

If the officer on the expiration of a term must turn over the funds with which he is charged, to a successor, who is a different person, actual payment to such successor is required; if made, the sureties for the expired term are thus exonerated; if not made, the deficiency is at once manifest, and there is a breach of the official bond. Payment discharges the debt of the late incumbent, if he held the funds as a debtor or banker; or fulfils the trust and performs the contract, if he held the money as agent or bailee. In either case, the actual payment, or the necessity of actual payment, prevents any uncertainty or confusion.

The same result may be attained, where the successor is the same person, if there is an actual identification and appropriation of funds to the amount charged; or a deficiency ascertained, by an official settlement; but otherwise, the debt, which the state of the accounts for the earlier term shows, will not be satisfied, or be the subject of a default, until actual payment is subsequently called for. The theory that the officer is a debtor instead of a bailee, postpones, in such a case, the exoneration of the sureties, and apparently extends the period of their responsibility. But if the officer is a mere bailee, their exoneration depends merely on the fact whether the public funds are in hand at the expiration of their term; and the liability of the sureties for the next term depends on the same fact.²

Where a treasurer holds his office for several consecutive terms, and is found to be a defaulter at the end of his last term, it has been presumed, in the absence of proof to the contrary, that the entire default occurred in his last term.³ The sureties

¹ *Detroit v. Weber*, 29 Mich. 24; *Commonwealth v. Reitzel*, 9 Watts & S. 109; *The Freeholders v. Wilson*, 1 Harr. 110; *Freeholders v. Wilson*, 16 N. J. 110.

² *U. S. v. Boyd*, 15 Pet. 187; *Broome v. U. S.* 15 How. 143; *Beyerle v. Hain*, 61 Pa. St. 226; *U. S. v. Eckford's Ex'r*, 1 How. 250; *Thompson v. Dickerson*, 23 Iowa, 360; *Com-*

monwealth v. Reitzel, 9 Watts & S. 109; *Independent Sch'l Dist. v. McDonald*, 39 Iowa, 564; *State v. Corey*, 4 West. L. M. 563; *Creswell v. Nesbitt*, 16 Ohio St. 35; *Street v. Laurens*, 5 Rich. Eq. 237. See *Overacre v. Garrett*, 5 Lans. 156.

³ *Kelley v. State*, 25 Ohio St. 567; *Helter v. Lane*, 43 Tex. 279.

in the last bond, when a final settlement is made, are *prima facie* liable for the amount thus shown to be in his hands. To render the sureties in a former bond liable, it must be established that the money was converted during the period covered by their bond.¹

If the officer owns the funds which come into his hands officially, his sureties are bound until he has paid the debt arising from such receipt. Although the identical funds so received may be in the officer's hands at the expiration of his term, and at the beginning of the term next succeeding in which he is his own successor, still, unless they are in some way identified as public funds in the latter term, so that the sureties for that term become responsible as for so much received then by the principal, the sureties for the former term must continue to be liable until actually paid according to law.

On the other hand, if the officer is required to hold the specific funds which he receives, or if he is merely agent of the public, so that all his acts in the management of the public funds are official, whatever changes they undergo in his possession, his liability ceases on the expiration of his term, if, at that time, none of the funds have been misapplied.

This difference in the principle of their official liability in question is further illustrated by the decisions relative to the appropriation of payments made by the officer. On the principle that he owes a debt to the extent of his official receipts, and that the title to the public funds vests in him personally, all the payments he makes must be deemed to be made out of his own funds, whether derived from public or private sources. Therefore, he would have a right, if he chose, to apply all the moneys which came to him in one term to satisfy defalcations in another.² But if the officer is a mere trustee, having charge of

¹State v. Paul's Ex'r, 21 Mo. 51; State v. Smith, 26 Mo. 226; Alvord v. U. S. 13 Blatchf. 279; Readfield v. Shaver, 50 Me. 36; Bruce v. U. S. 17 How. 437, 443; City of St. Joseph v. Merlatt, 26 Mo. 233; Morley v. Metamora, 78 Ill. 394; Snaggs v. Stone, 7 Jones' L. 382. See Miller v. The County of Macoupin, 7 Ill. 50; and

Coons v. People, 76 Ill. 383; Hetten v. Lane, 43 Tex. 279.

²Colerain v. Bell, 9 Met. 499. The principle of this decision was approved and made the basis of the judgment in *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112. See *Steinback v. State*, 38 Ind. 483. See also *Chapman v. Commonwealth*, 25

and administering the funds of the public, of which he is the servant, he has no option to apply funds collected subsequently to the execution of the second bond, to the discharge of the first, when the sureties are different.¹

Gratt. 721; *Sandwich v. Fish*, 2 Gray, 298; *Cook v. State*, 13 Ind. 154; *State v. Smith*, 26 Mo. 226; *Wilson v. Burfoot*, 2 Gratt. 134; *Lyndon v. Miller*, 36 Vt. 329; *Seymour v. Van Slyck*, 8 Wend. 403.

¹ *U. S. v. January*, 7 Cranch, 570; *Jones v. U. S.* 7 How. 681; *U. S. v. Eckford's Ex'r*, 1 How. 250; *Myers v. U. S.* 1 McLean, 493; *U. S. v. Boyd*, 15 Pet. 208; *Farrar v. U. S.* 5 Pet. 373; *County of Mohaska v. Ingalls*, 16 Iowa, 81; *Bessinger v. Dickerson*, 20 Iowa, 260; *Warren Co. v. Ward*, 21 Iowa, 85; *Readfield v. Shaver*, 50 Me. 36; *Thompson v. Dickerson*, 22 Iowa, 360; *Paw Paw v. Eggleston*, 25 Mich. 36; *Porter v. Stanley*, 47 Me. 515; *Mann v. Yazoo*, 31 Miss. 574; *Stone v. Lyman*, 15 Wend. 19; *City of Paducah v. Cudy*, 9 Bush, 323; *Readfield v. Shaver*, 50 Me. 36; *State v. Smith*, 26 Mo. 226. In *Miller v. The County of Macoupin*, 7 Ill. 50, a school commissioner held office from 1834 to 1839, without any new appointment, being annually required to give, and giving, with fresh sureties, a new official bond. He received money every year. In going out of office in 1839, he had not legally disbursed any portion of the school fund, nor did he pay over any to his successor. The county sued the bond for 1837. It was held that the sureties were liable for the moneys in his hands during the year 1837. *Scates, J.*, delivering the opinion of the court, said the case was distinguished from the cases where the same person holds the same office for several terms as suc-

cessor to himself. "Here," he says, "was no reappointment, but a continuing term of office, with annual bonds conditioned for the faithful performance of the duties required, or thereafter to be required by law. It was the duty of the commissioner by law to loan all moneys in his hands, belonging to the county and several townships, and keep the same at interest, except such sums as might be directed by law to be disbursed from time to time. Now, he neither loaned, disbursed nor paid over to his successor any portion of these funds. He only brought forward and stated them in account, from year to year. Thus, by including all previous receipts in the statement of each year's account, he showed the whole amount in his hands. But surely, no one can rationally contend that this is a payment. He was not reappointed annually; he did not succeed himself; it was but one term of office from 1834 to 1839. It might as reasonably be contended that one in default, having received a new appointment, by including the amount in default in stating an account, thereby paid it. Such a position is not sustained by law, reason or justice. Not having, therefore, made loans, disbursements, or payments to his successor of any portion of the money received during the year 1837, the sureties are still liable to account for that sum." *Postmaster General v. Munger*, 2 Paine C. C. 189; *Poole v. Cox*, 9 Ired. 69; *Holeran v. School District*, 10 Neb. 406.

THE OMISSION OF SUPERVISING OFFICERS TO MAKE PERIODICAL EXAMINATIONS OR SETTLEMENTS REQUIRED BY LAW.—Official bonds are construed, as has been already shown, as requiring the custodians of public moneys to safely keep and administer them. This duty is absolute, and the funds are wholly at the risk of the officer to whose keeping they are committed. His sureties are bound not only for the safety of the money, as against losses by fire, theft or robbery, but also from the fault or wrong of the officer himself. Laws requiring that official examinations of his accounts at short and stated periods, or at irregular periods, shall be made, are no part of the contract with the sureties. Such provisions are enacted for further security and protection of the public, and are not intended for the benefit of the sureties.¹ Such regulations may even impose the duty of active measures on the discovery of any defalcation, for dismissal of the officer, or the recovery of moneys misapplied; but they are held directory, and, if not complied with, the omission is no defense to an action against the sureties.² The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions.³

The neglect of one public servant to perform his duties cannot be set up as a reason why the sureties of another should be released from responsibility for the misconduct of their own principal, in no way caused by that neglect, and only made public later than it would have been if there had been no neglect.⁴ The same doctrine has been applied in actions against sureties of agents and officers of private corporations.⁵

¹ Christian, Ex parte, 23 Ark. 641; Christian v. Ashley Co. 24 Ark. 142; U. S. v. Kirkpatrick, 9 Wheat. 720; U. S. v. Van Zandt, 11 Wheat. 184; U. S. v. Nicholl, 12 Wheat. 505; People v. Jenkins, 17 Cal. 500.

² Id.

³ U. S. v. Kirkpatrick, supra.

⁴ Detroit v. Weber, 26 Mich. 284; City of Paducah v. Cally, 9 Bush,

333; Ex parte Christian, 23 Ark. 641; Christian v. Ashley Co. 24 Ark. 142; People v. Russell, 4 Wend. 570; People v. Foote, 19 John. 58. The doctrine of People v. Jansen, 7 John. 332, does not appear to have been adhered to in that state.

⁵ State v. Atherton, 40 Mo. 209; Minor v. Mechanics' Bank, 1 Pet. 46; State Bank v. Lock, 4 Dev. 529;

SECTION 3.

OTHER OFFICIAL BONDS.

General mode of redress for official dereliction — What private injuries covered by official bonds — The measure of damages.

THE GENERAL MODE OF REDRESS FOR OFFICIAL DERELICTION.— The chief object of other official bonds, than those of fiscal officers, is to provide additional security for the faithful performance of official duties at the instance or for the benefit of private individuals. And in some form the persons who suffer injury by the neglect or misconduct of the officer may severally resort to the bond, by independent proceedings, for redress in damages. In some states the judgment is given for the penalty once for all; the party for whose benefit the action is instituted assigns such breaches as have affected him, and damages are assessed thereon and collected for his benefit; other breaches may be afterwards assigned by him, and by others who have cause to complain, until the aggregate recoveries equal the penalty.¹ In other jurisdictions, judgment may be recovered in each individual case for the penalty to be discharged by payment or collection of special damages assessed on the breaches assigned.²

Amherst Bank v. Root, 2 Met. 522; Morris Canal & Banking Co. v. Van Vorst, 1 N. J. 100. See Atlantic & Pacific Tel. Co. v. Barnes, 64 N. Y. 385; Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Ashton, L. R. 8 Exch. 73.

¹ People v. Berdsall, 20 John. 297; People v. Mathewson, 20 John. 300; Richardson v. Smith, 2 Jones' L. 8; Mitchell v. Laurens, 7 Rich. 109; Ridener v. Rogers, 6 B. Mon. 594; Skinner v. Phillips, 4 Mass. 68; McGuire v. Justices, 7 B. Mon. 340; Fuller v. Holmes, 1 Aik. 111; Rodes v. Commonwealth, 6 B. Mon. 359; Hartz v. Commonwealth, 1 Grant's Cas. (Pa.) 359; Jackson v. Rundlet, 1 Wood. & M. 381; Eason v. Sutton, 4 Dev. & Batt. 484; Gibson v. Martin, 7 Humph. 127; Wells v. Commonwealth, 8 B. Mon. 459; Trice v.

Turrentine, 13 Ired. 212; Norton v. Mulligan, 4 Strobbh. 355; Guin v. Barton, 6 How. U. S. 7; Stephens v. Crawford, 3 Ga. 499; Harrison v. Brown, 1 Swan (Tenn.), 272; Wilson v. Cantrell, 19 Ala. 642; State v. McAlpin, 6 Ired. 347; Sheppard v. State, 3 Gill, 289; White v. Wilkins, 24 Me. 299; Commonwealth v. Straub, 35 Pa. St. 137; Lynch v. Commonwealth, 16 S. & R. 368; Campbell v. Commonwealth, 8 S. & R. 414; People v. Holmes, 2 Wend. 281; Lawton v. Erwin, 9 Wend. 233; Treasurers v. Ross, 4 McCord, 273; Hernandez v. Montgomery, 14 Martin, 422. But see Hatch v. Attleborough, 97 Mass. 533.

² Sangston v. Commonwealth, 17 Gratt. 124; Skinner v. Phillips, 4 Mass. 68.

And in others, the judgment is rendered directly for the damages awarded for breach of the condition; and to some extent by summary proceedings on motion.¹ The person who first sues and obtains judgment is entitled to the whole penalty, if his demand amount to so much, in exclusion of other claimants.² And the same rule holds, though the party who first sues is prevented from obtaining judgment, by a stay of proceedings, on the defendants paying into court the penalty of the bond.³ And where, after one suit on such bond, several sue on it at the same term, the surplus will be divided among them *pro rata*: but if, instead of suing, they apply to the court to come in under the first suit, he who first applies will be entitled to priority of payment.⁴ Such bonds are given for the benefit of all persons who may be aggrieved by the negligence or misconduct of the officer; and no individual can receive voluntary payment of the amount of it, and no payment to an individual will exonerate the obligor. Faithfully accounting for moneys to the amount of the penalty will not satisfy an official bond. It will stand good for losses and defalcations to that amount. For this reason it is unnecessary, in a declaration upon such a bond, to aver the non-payment of the penalty.⁵

WHAT PRIVATE INJURIES COVERED BY OFFICIAL BONDS.—In such actions, damages may be recovered by any person suffering injury from neglect to perform, or negligent performance of official acts which he had a right to require, and have performed, for his private benefit;⁶ or from torts committed by

¹ *Wolverton v. Commonwealth*, 7 S. & R. 273; *Withrew v. Commonwealth*, 10 S. & R. 231; 2 Dill. C. C. 45; *Hendricks v. Shoemaker*, 3 Gratt. 197; *Tyree v. Donnally*, 9 Gratt. 64; *Graham v. Chandler*, 12 Ala. 829; *Camp v. Watt*, 14 Ala. 614; *Collier v. Powell*, 23 Ala. 579; *McCrosky v. Riggs*, 12 S. & M. 712; *Young v. Hare*, 11 Humph. 303.

² *Dallas v. Chaloner*, 3 Dall. 501, note; 4 Dall. 106, note; *Christman v. Com'lth*, 17 S. & R. 381; *Glide-well v. McGaughey*, 2 Blackf. 357.

³ *McKean v. Shannon*, 1 Binn. 370. See *State v. Wayman*, 2 Gill & J. 254. Compare *State v. Ford*, 5 Blackf. 393.

⁴ *McKean v. Shannon*, 1 Binn. 370. ⁵ *State v. McClane*, 2 Blackf. 192; *Potter v. Titcomb*, 7 Greenlf. 319; *Commonwealth v. Montgomery*, 31 Pa. St. 519.

⁶ *State v. Wall*, 9 Ired. 20; *State v. Johnson*, 7 Ired. 77; *Wyche v. Myrick*, 14 Ga. 584; *Treasurer v. Ross*, 4 McCord, 273; *Rowland v. Wood*, 4 Dana, 194. The sureties in a sher-

virtue or under color of office, and which are specially injurious to him.¹ The sureties of a sheriff are liable for money collected by him under color of his office, although the writ may have been erroneous or illegal.² But it has been held that money received by a sheriff on account of an execution after the return day is not officially received, and a failure to pay it over is not a breach of his official bond.³ So, where a defendant in an execution paid to the sheriff the amount thereof in depreciated currency, adding a sum to make it equal to par, and the plaintiff in the execution refused to receive it, so that the defendant was compelled to pay the amount in other funds; and the sheriff, on demand, failed to repay him the depreciated funds, it was held that the sheriff and his sureties were not liable therefor on his official bond, although the sheriff would be individually

iff's bond are not liable to a printer for advertising notices, rules, audits, inquisitions and sales ordered by the sheriff, though it was part of his official duty to cause such advertisements to be made, and for neglect of which they would have been responsible. The duty to pay in such case is not official. *Commonwealth v. Swope*, 45 Pa. St. 535; *Allen v. Ramy*, 4 Strobb. 30; *Crocker v. Fales*, 13 Mass. 260; *Wilson v. State*, 13 Ind. 341; *Brown v. Phipps*, 6 Sm. & M. 51.

¹ But it has been repeatedly held, that where a sheriff, or like officer, with process authorizing a seizure of A's property, takes B's, the latter may recover damages therefor upon such officer's official bond. *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Gratt. 124; *Archer v. Noble*, 3 Greenlf. 418; *Harris v. Hanson*, 11 Me. 241; *Carmack v. Commonwealth*, 5 Binney, 184; *Skinner v. Phillips*, 4 Mass. 68; *Schloss v. White*, 16 Cal. 65; *Halliman v. Carroll*, Adm'r, 27 Tex. 23; *Commonwealth v. Stockton*, 5 Monroe, 192;

Forsythe v. Ellis, 4 J. J. Marsh. 299; *People v. Schuyler*, 4 N. Y. 173, reversing S. C. 5 Barb. 156; and overruling *Ex parte Reed*, 4 Hill, 572; *Van Pelt v. Little*, 14 Cal. 194; *Tracy v. Godwin*, 5 Allen, 409; *Dennison v. Plumb*, 18 Barb. 89; *State v. Moore*, 19 Mo. 369; *State v. Farmer*, 21 Mo. 160; *McElthaney v. Gilliland*, 30 Ala. 183; *Commonwealth v. Williams*, 4 Litt. 335; *Brunott v. McKee*, 6 Watts & S. 513; *Gilbert v. Isham*, 16 Conn. 525; *Strunk v. Ocheltree*, 11 Iowa, 158; *Charles v. Haskins*, 11 Iowa, 329; *Greenfield v. Wilson*, 13 Gray. 384; *Dane v. Gilman*, 49 Me. 173. Compare *State v. Brown*, 11 Ired. 141, and *State v. Conover*, 4 Dutch. 224. And also *Taylor v. Parker*, 43 Wis. 78; *Cairnes v. O'Brien*, 40 Wis. 470; *Gerber v. Ackley*, 37 Wis. 43; *State v. Mann*, 21 Wis. 684.

² *Rollins v. State*, 13 Mo. 437; *The Treasurers v. Buckner*, 2 McMull. 32.

³ *Dean v. The Governor*, 13 Ala. 526; *Fitzpatrick v. Branch Bank*, 14 Ala. 533; *Commonwealth v. Cole*, 7 B. Mon. 250; *Radford v. Hull*, 30 Miss. 712.

liable.¹ An action will not lie on an officer's bond, given for the faithful performance of the duties of his office, for an act which is beyond the scope of his authority, although done under color of his office.² Where a sheriff sold property taken on attachment, by agreement between the plaintiff and defendant, and without an order of the court, it was held that his sureties could not be made liable on the official bond for his failure to pay over the money.³ The bond of a clerk of a court was conditioned for the faithful performance of the duties required of him by law; but it was held not a part of his duty to collect the fees of other officers of the court, and that he could not be held liable on his official bond for not paying over such fees, if he had received any.⁴ And where a party arrested gave bail, which was objected to for insufficiency, and to obviate the objection made a deposit of money with the sheriff, it was held his sureties were not liable for it.⁵

THE MEASURE OF DAMAGES.—The measure of damages in all cases against sureties of an officer, in the absence of any statutory rule, is just compensation for actual injury.⁶ Sureties in

¹ Brown v. Mosely, 11 S. & M. 354.

² State v. McDonough, 9 Mo. App. 63; Kerr v. Brandon, 84 N. C. 128; Furlong v. State, 58 Miss. 717; People v. Gardner, 55 Cal. 304.

³ Governor v. Perrine, 53 Ala. 807.

⁴ Matthews v. Montgomery, 25 Miss. 150.

⁵ State v. Long, 8 Ind. 415. See Beals v. Commonwealth, 7 Watts, 183; Boseley v. Smith, 3 Humph. 406; State v. Daly, 3 Ind. 431; Bockmer v. Schuylkill, 46 Pa. St. 452; Governor v. Pearce, 31 Ala. 465; State v. White, 10 Rich. L. 442; Webber v. Ausfach, 3 Ohio St. 522; State v. Rollins, 29 Mo. 267; Mills v. Allen, 7 Jones' Law, 564; Hinckler v. County Co. 27 Ill. 39; Boston v. Moore, 3 Allen, 126; Brooks v. Gibbs, 2 Jones' Law, 326; Smith v. Berry, 37 Me. 298; Hardin v. Carico, 3 Met. (Ky.) 289. A constable gave a bond, conditioned, "well and

truly to demean himself in office." Held, that he and his sureties were responsible on such bond for a failure to pay over money collected as constable, but without process, in his hands. Boseley v. Smith, 3 Humph. 406.

⁶ Brobst v. Skillen, 16 Ohio St. 332; Hill v. Lowry, Tappan (Ohio), 149; State v. Lawson, 2 Gill, 62; State v. Johnson, 7 Ired. 77; State v. Watson, 7 Ired. 289; Sedam v. Taylor, 3 McLean, 547; Crawford v. Andrews, 6 Ga. 244; Ziegler v. Commonwealth, 12 Pa. St. 227; Bevans v. Ramsey, 15 How. U. S. 179; Karch v. Commonwealth, 3 Penn. St. 269; Brooks v. Governor, 17 Ala. 206; Wyche v. Myrick, 14 Ga. 584; Taylor v. Johnson, 17 Ga. 521; Dobbs v. Justices, 17 Ga. 624; Chapman v. Smith, 16 How. U. S. 114; Reed v. Goettie, 7 Rich. 126; Carpenter v. Dordy, 1 Hilt. 465; State

such bonds are not liable for penalties imposed by statute upon their principal.¹

The sureties in the official bond of a justice of the peace are only liable for his misconduct or defaults in respect to his ministerial duties; they are not liable for errors of a judicial character.² In respect to the time for which such sureties are liable for the acts of their principal, it is clear that the responsibility commences at the date of entering into the bond, unless by its terms it extends to past transactions;³ and that it does not continue beyond the official term for which the bond was made, except in respect to such duties or business of that term as the incumbent is required to perform and complete afterwards.⁴ When the law provides that an officer shall hold until

v. Atkinson, 17 Ind. 26; Governor v. Evans, 1 Dev. & Bat. 243; Governor v. Matlock, 1 Hawks, 425; The Treasurer v. Clowney, 2 McMull. 570; Anderson v. Joliet, 14 La. Ann. 114; Bennett v. Vingard, 34 Mo. 216; Lowell v. Parker, 10 Met. 309; Commonwealth v. Allen, 30 Pa. St. 49; Findley v. Hutzell, 29 Pa. St. 337; Perkins v. Giles, 9 Leigh, 397; Griffin v. Underwood, 16 Ohio St. 389; Governor v. Matlocks, 1 Hawks, 425; Commonwealth v. Bradley, 1 Litt. 48; Commonwealth v. Sayres, 1 Miles, 235; United States v. Moore, 2 Brock. 317. See Crawford v. Ward, 7 Ga. 445. In assessing damages on a sheriff's bond in Arkansas for breach in not returning an execution, interest will be computed on the aggregate of the debt and interest in the execution. Norris v. State, 22 Ark. 524; Henry v. Ward, 4 Ark. 151. See Gibson v. Governor, 11 Leigh, 600.

¹Brooks v. Governor, 17 Ala. 806; Wyche v. Myrick, 14 Ga. 584; McDowell v. Burwell, 4 Rand. 317; Fletcher v. Chapman, 2 Leigh, 565; Lawson v. Pulaski, 3 Pike, 1; The Treasurer v. Buckner, 2 McMull. 323; The Treasurer v. Hilliard, 8

Rich. 412; Foote v. Van Zandt, 34 Miss. 40. It is otherwise in Arkansas. Christian v. Ashley Co. 24 Ark. 142.

²McGrew v. Governor, 19 Ala. 89. See Gaesdorf v. Gleason, 10 Iowa, 495.

³Rochester v. Randall, 105 Mass. 295.

⁴Tyree v. Wilson, 9 Gratt. 59; Ingram v. McComb, 17 Mo. 558; Dumas v. Patterson, 9 Ala. 484; State v. Johnson, 7 Ired. 77; Pooley v. Cox, 9 Ired. 69; Warren v. State, 11 Mo. 583; Faulkner v. State, 4 Eng. 14; State v. Van Pelt, 1 Ind. 304; Evans v. Bank, 15 Ala. 81; Dixon v. Caskey, 18 Ala. 97; Marney v. State, 13 Mo. 7; State v. Wall, 9 Ired. 20; State v. Roberts, 7 Halst. 114; People v. Ring, 15 Wend. 623; People v. Ten Eyck, 13 Wend. 448; Tyler v. Nelson, 14 Gratt. 214; Low v. Cobb, 2 Sneed (Tenn.), 18; Latham v. Fagan, Jones' Law, 62; Collyer v. Higgins, 1 Duvall, 6; State v. Roberts, 7 Halst. 114; Larned v. Allen, 13 Mass. 295; U. S. v. Giles, 9 Cranch, 212; Elkin v. People, 3 Scam. 207; People v. McHenry, 19 Wend. 482; Bruce v. State, 11 Gill & J. 382; Robey v. Turner, 8 Gill & J. 125; U.

his successor is qualified, it has been held that his bond covers his acts as long as he so holds.¹ And this rule has been applied where the term was enlarged by statute, and a new bond required to be given for the time of the extension, and not given.² And where new bonds are required to be given periodically during an official term, all such additional bonds given during the same term are usually treated as cumulative.³ The sureties in each bond are held bound for so much of the term as is subsequent to its execution.⁴ It is otherwise, of course, where on the execution of a new bond the sureties in the preceding bond are in form or by implication released.⁵ And a substituted surety in an existing bond will be held liable for past as well as subsequent transactions covered by the bond as executed by the original surety.⁶

Where the same official duty is neglected continuously from one term into another, by the same officer succeeding himself,—as where an execution is delivered to a sheriff near the close of his term of office, and he neglects to execute it, and by law it passes to the incumbent of the succeeding term, for which the same person is re-elected, who after his re-election continues his neglect to serve the writ, the party injured may sue the sureties in the bond for either term at his election.⁷ And the circumstance that the plaintiff might recover on the second, if he had chosen to do so, will not go even in mitigation in an action on the first bond.⁸

A bond given by a public officer is only a collateral security

S. v. Spencer, 2 McLean, 405; *State Treasurer v. Mann*, 34 Vt. 371; *Wapello v. Bigham*, 10 Iowa, 39; *Loan Co. v. Association*, 48 Pa. St. 446; *State v. Gremsey*, 19 Mo. 171; *Latham v. Fagan*, 6 Jones' L. 62; *Welch v. Seymour*, 28 Conn. 387; *Dover v. Trombley*, 42 N. H. 59; *Thomas v. Summy*, 1 Jones' L. 554; *King v. Nichols*, 16 Ohio St. 80; *McCormick v. Moss*, 41 Ill. 352. See *Governor v. Robbins*, 7 Ala. 79; *Sherrell v. Goodran*, 3 Humph. 419; *Butler v. State*, 20 Ind. 169.

¹*Thompson v. State*, 37 Miss. 518.

²*Commonwealth v. Drewry*, 15 Gratt. 1. But compare *Brown v. Lattimore*, 17 Cal. 93.

³*Pooley v. Cox*, 9 Ired. 69; *Postmaster v. Munger*, 2 Paine C. C. 189; *Miller v. Macoupin*, 7 Ill. 50; *State v. Crooks*, 7 Ohio, pt. 2, 221; *Governor v. Robbins*, 7 Ala. 79. Compare *Hewett v. State*, 6 Har. & J. 95.

⁴*Id.*

⁵*Miller v. Moore*, 3 Humph. 189.

⁶*Treasurers v. Taylor*, 2 Bailey, 524.

⁷*State v. Roberts*, 7 Halst. 114.

⁸*State v. Wall*, 9 Ired. 20.

for the faithful performance of the official duties of the officer. This collateral obligation can exist no longer than the liability it was created to secure. It is of the essence of the contract of suretyship that there be a subsisting valid obligation of the principal debtor. Whatever, therefore, amounts to a good defense to the original liability of the principal, is a good defense for the sureties.¹

SECTION 4.

PROBATE BONDS.

Bonds for faithful administration of decedent estates—How such bonds made; what recoveries may be had thereon—Actions on the bond as to sureties—Guardian's bond.

BONDS FOR FAITHFUL ADMINISTRATION OF DECEDENT ESTATES.—

The responsibility of the obligors in these bonds arises from their contract which is adapted to secure the performance of the principal's duties. These include making and returning a full and true inventory, care and fidelity in the preservation and administration of the estate, and in the end a faithful accounting.

In the case of decedent estates, assets constitute a trust fund; first for creditors, and secondly for legatees and distributees.² The ordinary administration bond has substantially the following conditions: 1st, that the administrator will make and exhibit an inventory; 2d, that he will well and truly administer the estate; 3d, that he will make a true account of his administration; and 4th, that he will deliver and pay over to the persons entitled the residue. Distributees have an interest in the performance of all these conditions and creditors only in the performance of the first two.³

¹State v. Blake, 2 Ohio St. 147; Mt. Pleasant Bank v. Conway, 18 Ohio, 234.

²Dawson v. Dawson, 25 Ohio St. 443.

³Blakeman v. Sherwood, 32 Conn. 324. In Ordinary v. Cooley, 30 New J. L. 271, Vredenburgh, J., gives an interesting sketch of the early practice and the successive statutes on the subject of administration of the

personal estates of deceased persons. He says: "In very early times, the king, as *parens patriæ*, was entitled to the personal property of intestates. He took possession of them, and, practically, after paying debts, gave two-thirds to the widow and children, and kept the balance himself. This payment of debts, and giving two-thirds to the widow and children, was a matter of grace,

HOW SUCH BONDS MADE; WHAT RECOVERIES MAY BE HAD THEREON
Such bonds are usually executed to the state or to some officer having probate jurisdiction. When sued for the benefit of the estate, as the practice is in some states, especially for the

and not a legal right. He had the legal right to keep the whole, if he saw fit. But in those early times the influence of the Roman clergy was very great, and continually on the increase. They represented to the king that the souls of the intestates were inconveniently delayed in purgatory, for the want of masses said for them, and that it was an unconscientious thing in him to deprive the intestate by distribution thus of his own property, just when he most wanted it, and the king ought to pass his prerogative in this regard to them, so that they could appropriate it to that use, and thus the true owner get the value of his property. Partly by such persuasions, and partly from fear of the pope, the king finally passed these prerogatives to Roman bishops, who, by virtue thereof, stood in the king's shoes, and so legally entitled to the whole personal estates of intestates; and this is the origin of the ecclesiastical courts of England, and the prerogative and orphans' courts in this state. The Roman clergy, being thus under no legal obligation to pay debts, or to distribute any part of the estate to the next of kin, felt bound in conscience strictly to execute the trust. The widow and children easily acquiesced in this arrangement, but the creditors were always somewhat reluctant; and accordingly we find that the barons at Runymede procured an insertion in *Magna Charta* that the bishops should pay the debts and distribute. But the Roman clergy had influence enough to avoid its execution. So that this provision of the great

charter fell obsolete. Not only so, but afterwards, in the great charter of Henry the third, they had influence enough to cause the whole subject matter to be ignored. Things remained in this condition, the bishops having the legal right to all the personal property of intestates, and without either paying debts or accounting to the next of kin, until the thirteenth year of the reign of Edward the first, when it was enacted that the ordinary should be bound to pay the debts of the intestates, as far as his goods extended. But the ordinary yet gave no security whatever, and all the residuum, after the payment of debts, still remained in his hands, to be disposed of for pious uses. Thus it continued until the thirty-seventh year of the reign of Edward the third, when parliament, in consequence of the flagrant abuses practiced, enacted that 'in case where a death of an intestate occurs, the ordinary shall depute of the next and most lawful friends of the dead person to administer his goods; which persons deputed shall have action to demand and recover, as executors, the debts of said intestate to administer and dispense for the soul of the dead, and shall answer also in the king's courts to others to whom the said deceased was holden and bound.' It will be observed that this statute merely took from the ordinaries the power to administer, and compelled them to grant the administration to the next and most lawful friends of the intestate; and all the administrator had to do, was to pay the debts. He gave no bond

breach of the first condition, the recovery enures to the benefit of all parties interested, in the same order as they would have been benefited by a due performance of the administrator's duty. There can be no recovery beyond nominal damages,

of security; and he retained all the residuum, after the payment of debts, as his own property.

"There was yet no such thing as distribution amongst the next of kin, or security given by the administrator, either to pay debts or to distribute. As soon as the debts were paid, the estate was administered, and there was nothing further to be done by the administrator. All the rest of the estate belonged to himself to *dispense*, in the language of the statute, for the soul of the dead. The administration by this statute, it will be observed, was granted to the next and most lawful friends of the intestate. The language was afterwards altered by the statute of Henry VIII, and the ordinary compelled to grant the administration to the widow or the next of kin of the intestate; and which is the same as our own statute now in force. It will be perceived that as yet no change is made in the rights of the administrator. There is yet no statute of distribution; the administrator takes all after the payment of debts. But the statute of 21 Henry VIII introduces one great change. It requires, for the first time in the history of administrations, that the ordinary shall take surety from the administrator, not to distribute, but only to pay debts. It could not have been, surely, that the administrator shall settle in the prerogative court, and pay the surplus, after the payment of debts, to the next of kin, for the surplus yet belonged to the administrator himself, to do with it as he pleased; and, moreover, there was as yet no statute of distribution.

But the only surety that could be required was that the administrator would make and exhibit an inventory, and pay the debts, or, as it was then technically called, administer the estate. So that, by the statute of 21 Henry VIII, the bond given by the administrator contained two conditions; one was the exhibiting an inventory, the other was to pay the debts. These, it will be observed, are the two first conditions in the bond now required by our statute. . . . But these first two conditions were provided in the interest of creditors, and not in the interest of the next of kin; because there were yet no next of kin that could take or had an interest in the estate. Things remained in this condition until the 22d of Charles II, over a hundred years, when the first English statute of distribution was passed. The statute provided that the ordinary should call administrators to account, and order a just and equal distribution (after debts and funeral expenses were paid) among the wife and children and next of kin, substantially as our statute does now. And it provided in the second place, that the ordinary should require of the administrator a bond with security, and with the same conditions as our statutes now provide, viz.: 1st, to file an inventory; 2d, to well and truly administer the estate, or, in other words, to pay the debts; 3d, account in the prerogative court; and, 4th, pay the surplus found upon such accounting to the next of kin. Hence it is manifest that these two last conditions in the bond were required to

unless there is such misconduct of the administrator as results in actual injury to some person for whose protection the bond is required.¹

The heir at law may prosecute a suit on the bond in the name of the obligee for neglect to return an inventory, although his precise interest as heir has not been definitely settled, either by settlement of the administration account, or by an order for distribution. And the full value of the property withheld from

compel the administrator to perform the two additional duties imposed upon him by the last statute of 22 Charles II, viz.: 1st, to account to the prerogative court; 2d, to pay over the surplus found upon such accounting to the next of kin. This is further manifested from another historical fact. After the said statute of Edward III took away from the Roman bishops the power to administer themselves, and forced them to grant administration to the next of kin, like other people, they were very prompt to force others to be honest, as soon as they had no temptation to be otherwise themselves, and they attempted to force the administrator to give security to distribute to the next of kin; but they were restrained by the courts of common law, by prohibitions, upon the ground that the statute of Edward III meant to give to the administrator appointed by the ordinary the same rights of property that the ordinary himself had before that statute was passed, and that consequently the administrator was not obliged to account or distribute, and that his only duty was to pay the debts, and that he might do with the surplus what he pleased; and no bond ever was, or ever could be, required of the administrator to account or distribute, until those additional duties were expressly imposed upon him by the said

statute of 22 Charles II. This statute was passed in the year 1661, and was among the very first of our colonial statutes, and has to this day remained unaltered upon our statute book. So that, by this short historical resumé, it appears that originally the administrator neither paid debts nor distributed. After some hundreds of years, he was first made to pay debts; after some more hundreds of years, he was next made to give security to pay debts; after over a hundred years more, he was made to distribute the surplus, after paying debts, and to insert in his bond the additional condition, that he should distribute. So that it would appear that these conditions of our administration bonds of the present day, were the growth of many centuries of English legislation, each additional condition being added as each additional duty was imposed by statute upon the administrator. Thus we see how each stone was laid in the edifice, and came to have its peculiar form and color. The very antiqueness of the language of these conditions gives evidence of their origin, and their natural import is in accord with their history."

¹ *Edwards v. White*, 12 Conn. 28; *Spencer v. Wilkinson*, 11 Conn. 1; *Adams v. Spalding*, 12 Conn. 350; *Scarborough v. State*, 24 Ark. 20; *State v. Bloxom*, 1 *Houst.* 446.

the inventory may be recovered. The estate is the loser to the precise extent of the property withheld; and that should be made good. If any equitable circumstances exist which would go to show that the loss to the estate is less than the full value, it devolves on the defendant to prove them.¹ The plaintiff acts as trustee for the persons beneficially interested in the estate.² And the money recovered must be applied to the payment of all the debts of the intestate, in their order, giving preference to those that have a preference by law, and making a ratable distribution among all others.³

If the estate be insolvent, each creditor is entitled to receive an average with others.⁴ There is no liability beyond the amount of assets which come to the hands of the administrator. But it is his duty to apply them to the payment of debts; and a suit on his bond by a creditor having a debt so liqui-

¹ Blakeman v. Sherwood, 32 Conn. 324, 329; Minor v. Mead, 3 Conn. 289; State v. Bennett, 24 Ind. 388; Boston v. White, 21 Pick. 58. See Dawson v. Dawson, 25 Ohio St. 443.

² Thomas v. Leach, 2 Mass. 152; Paine v. Ball, 3 Mass. 235; Skinner v. Phillips, 4 Mass. 874; Rowland v. Isaacs, 15 Conn. 115.

³ Dickerson v. Robinson, 6 New J. L. 237. In this case, Kirkpatrick, C. J., said: "This is certainly the course of the ecclesiastical courts in England. . . . To show the more clearly that the application of the money recovered in these actions must necessarily be to the payment of all debts, let us pursue the thing a little. Let us suppose the administrator to have wasted the whole estate, and to be himself insolvent, and that there is nothing to respond to creditors but the administration bond; shall he that can first get the assignment of it, and a verdict and judgment for his debt, even though it be a simple contract debt, swallow up the whole penalty, take the whole money recovered to him-

self, and leave all other debts, even of a superior order, altogether unpaid? This, I think, would be hardly maintained by anybody; and it is to prevent this that the money recovered must be distributed by the judge of the prerogative court. What then is to be done upon such a recovery? Is the judge of the prerogative court to divide the sum so recovered among all the creditors, and so pay the assignee of the bond but a part of his debt [as would be the case if the assignee recovered only the damage to himself], and then put every other creditor to go through with the same course, and make a like division of what he might recover? And if it be an estate in which there is a surplus, shall he, after all, compel the next of kin to run the same race? This would, indeed, as Lord Ch. J. Holt says, *be endless and infinite*. But it is not so. No such breach can be assigned. The law runs itself into no such absurdity."

⁴ Warren v. Powers, 5 Conn. 373.

dated that it is the administrator's duty presently to pay it, is an action to recover for breach of their duty. And it is no answer to such an action that the administrator has not wasted or misapplied the assets. His retention of the assets, and failure to apply them to such debt, is a breach of the bond.¹ A creditor is in such cases entitled to recover the amount of his debt on the bond, if the assets are sufficient; and if not, such ratable proportion thereof as it was the administrator's duty to pay.²

Suits by legatees and distributees may also be instituted for the amount of the legacy or distributive share, when the administration has gone to such point that the immediate duty to pay it is imposed and neglected.³

Service performed, or money expended, in aid of the defendant's administration, cannot be shown in support of a suit on his bond, nor as a set-off against payments by the administrator, but are a claim on the defendant individually.⁴

¹ Cannon v. Cooper, 39 Miss. 784; State v. Nichols, 10 Gill & J. 27; Lining v. Giles, 3 Brev. 530; People v. Dunlop, 13 John. 437; Hazen v. Durling, 2 N. J. Eq. 133; Brown v. Glascock's Adm'r, 1 Rob. (Va.) 461.

² Pierce v. Whittemore, 8 Mass. 232; Thompson v. Searcy, 6 Port. 393; Fairfax v. Fairfax, 5 Cranch, 19; Sturdivant v. Raines, 1 Leigh, 481; Burnett v. Harwell, 3 Leigh, 89; Gardner v. Vidal, 6 Rand. 106; Miller v. Gill, 4 Ala. 359; Seat v. Cannon, 1 Humph. 471; Gordon v. State, 11 Ark. 12; Culla v. Patterson, 18 B. Mon. 201; Daws v. Shea, 15 Mass. 6; Inglehart v. State, 2 Gill & J. 235; People v. Summers, 16 Ill. 173; Warren v. Powers, 5 Conn. 373; Willey v. Paulk, 6 Conn. 74; People v. Randolph, 24 Ill. 324; State v. Campbell, 10 Mo. 724; Strong v. White, 19 Conn. 238; Hobbs v. Middleton, 1 J. J. Marsh. 176; Smith v. Fagan, 2 Dev. 292; Chairman v. Moore, 2 Murph. 22; Ordinary v. Bracey, 2 Bay, 512; People v. Dun-

lop, 13 John. 437; Gookin v. Hoyt, 3 N. H. 392; O'Connor v. Sach, 9 Bosw. 318.

³ Ralsten v. Wood, 15 Ill. 159; State v. Bennett, 24 Ind. 383; Jackson v. Justices, 2 Bibb, 292; State v. Ruggles, 20 Mo. 99; Judge v. Looney, 2 Stew. & Port. 70; Judge v. Emery, 6 N. H. 141; Judge v. Coulter, 3 Stew. & Port. 348.

Where the personal estate of an intestate consisted of slaves, it was held in an action upon the administration bond by a distributee, that the plaintiff could not recover both the appraised value of the slaves and their increase and hire, from the time of granting the letters, or the appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to, and real value at, the time of bringing the action, and the pleadings must disclose which course he elects to take. Burch v. State, 4 Gill & J. 444.

⁴ Gordon v. Clapp, 5 Vt. 129.

Where the breach is the non-payment of a dividend struck in the probate court, on a plea of payment, receipts showing payment to the plaintiff by a former administrator are admissible in evidence, and their effect cannot be defeated by showing waste by such former administrator.¹

ACTIONS ON BOND AS TO SURETIES.—In an action against the sureties on an administrator's bond, for a breach by the principal, the proceedings taken in the probate court, in passing on an account rendered by the administrator, and a decree rendered therein directing him to pay over a sum found remaining in his hands, are admissible in evidence against the sureties, although the sureties were not parties to the same. Such a decree is equally conclusive upon the administrator and his sureties; and upon the refusal of the administrator to obey the same, the liability of the sureties attaches; they cannot go behind the decree to inquire into the merits of the matter therein passed on, unless they can show that such decree was obtained by fraud or collusion.² As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court, or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule.³

GUARDIAN'S BOND.—A surety upon a bond given by a guardian for managing the whole estate of the ward, is liable for all money in the hands of the guardian, belonging to the ward, whether received before or after the undertaking of the surety.⁴ It includes property of the ward received by him in another state.⁵ It is not limited to property owned by the ward at the time the bond is executed, but extends to property subsequently acquired, which came into the guardian's hands.⁶ An action at law, however, cannot be maintained before the accounts have been adjusted and a specific sum decreed to be paid over.⁷ Nor

¹ Gordon v. Clapp, 5 Vt. 129.

² Irwin v. Backus, 25 Cal. 214.

³ Id.

⁴ McDowell v. Caldwell, 2 McCord Ch. 43; Merrell v. Phelps, 34 Conn. 109; Ammons v. People, 11 Ill. 6.

⁵ McDonald v. Meadows, 1 Met. (Ky.) 507.

⁶ Gray v. Brown, 1 Rich. 351.

⁷ Anderson v. Maddox, 3 McCord, 237; State v. Strange, 1 Ind. 538; Hunt v. White, 1 Ind. 105; Barrett

can a guardian's sureties be made liable for work done for him by the ward.¹ In actions upon the bond, the recovery is measured by the actual injury;² and where there is but a technical breach of the condition, but no loss, only nominal damages can be recovered.³ And in no case can the damages exceed the penalty.⁴

SECTION 5.

REPLEVIN BONDS.

The original condition — The condition for return of the property — Condition required by modern statutes — Not necessary to assess the damages in the replevin suit — When sureties in the bond not liable for the judgment in the replevin suit — Evidence of value — The damages recoverable on the bond — Effect of the judgment in the replevin suit — What may be shown in defense — When plaintiff only entitled to recover as special owner — Bond by defendant to retain the property.

THE ORIGINAL CONDITION.—The English statute enacted nearly six hundred years ago provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiff pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded.⁵ The statute of Geo. 2 was intended rather as an improvement and modification of the old security than as the creation of a new one.⁶ This required a bond with two sureties in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning goods and chattels distrained, in case a return should be awarded.⁷ Though framed for exclusive application to replevin of distress for rent, as were some early American statutes, it was the foundation of the practice in other cases.

These conditions have always been treated as independent, and if either was not complied with the bond was forfeited.⁸

v. Monroe, 4 Dev. & Bat. L. 194; Stilwell v. Mills, 19 John. 304; Salisbury v. Van Hoesen, 3 Hill, 77; Probate Co. v. Slason, 23 Vt. 306. Otherwise in Tennessee. Justices v. Willis, 3 Yerg. 461; Foster v. Maxey, 6 Yerg. 224. See Call v. Ruffin, 1 Call (Va.), 333.

¹Phillips v. Davis, 2 Sneed, 520.

²State v. Murray, 24 Md. 310.

³Fuller v. Wing, 17 Me. 222.

⁴Woods v. Commonwealth, 8 B. Mon. 112; Clancey v. Hawks, 497.

⁵West. 2, ch. 2; Edw. 1.

⁶Morris on Rep. 267.

⁷11 Geo. 2, ch. 19, § 23.

⁸Moore v. Bowmaker, 7 Taunt. 97; Perreau v. Bevan, 5 B. & C. 234;

The condition to prosecute the suit to effect and without delay has been uniformly interpreted to mean a continuous prosecution to a final judgment in favor of the plaintiff; the plaintiff must diligently pursue the case, and must succeed.¹

It is not a condition, the performance of which is in itself beneficial to the party for whose benefit the bond is made. But the recovery of a final judgment in favor of the plaintiff makes it clear, that, when the property was delivered to him at the commencement of the action, he received his own, and no wrong was done to the defendant. His bond is a penal undertaking to establish at as early a day as practicable that he had a right to possession when he obtained the writ. If he fails to do so, it appears as clearly that the possession which the plaintiff acquired by process based on the bond was wrongful, and injurious to the defendant to the extent of his interest in the property, and the costs to which he has been subjected in asserting that interest. On failure to fulfil the conditions, the penalty of the bond is forfeited, and relief is granted against a demand of the whole, only on the terms of making equitable compensation according to the injury caused to the defendant by the process by which he was deprived of possession. This compensation is only limited by the penalty of the bond; within that limit the plaintiff is entitled to the value of the property and costs of the replevin suit.² And the liability of the sheriff

Balsley v. Hoffman, 13 Pa. St. 603; Smith v. Newton, 38 Ill. 228; Lomme v. Sweeny, 1 Montana, 584; Morris on Rep. 250; Dunbar v. Dunn, 10 Price, 542; Whitman v. Jones, 5 N. H. 362; Gibbs v. Bartlett, 2 W. & S. 29; Neville v. Williams, 7 Watts, 421; Short v. Hubbard, 2 Bing. 348.

In New Hampshire and Ohio, a judgment for return seems never to have been a feature of the practice in replevin, and the bond contains no condition for return. Bell v. Bartlett, 7 N. H. 178; Smith v. McGregor, 10 Ohio St. 461.

¹Turner v. Turner, 2 B. B. 197; Perreau v. Bevan, 5 B. & C. 284; Ax-ford v. Perrett, 4 Bing. 586; Harri-

son v. Woodle, 5 B. & Ad. 146; Harrison v. Montstephen, 2 Dow. & Ry. 343; Balsley v. Hoffman, 13 Pa. St. 603; Morgan v. Griffith, 7 Mod. 380 (Cowp. 234); Dias v. Freeman, 5 T. R. 195; Brown v. Parker, 5 Blackf. 291; Gould v. Wenner, 3 Wend. 54; Jackson v. Hanson, 8 M. & W. 477; Phillips v. Price, 3 M. & S. 183; Perse v. Watrous, 30 Conn. 139; Lindsay v. Blood, 2 Mass. 518; Levy v. Blacklin, 2 Mass. 543.

²Branscombe v. Scarborough, 6 Ad. & E. N. S. 13; Gainsford v. Griffith, 1 Wm. Saund. 58, n. 1; Hunt v. Round, 2 Dow. P. C. 558; Ward v. Henley, 1 Y. & J. 285; Hefford v. Alger, 1 Taunt. 218; Gould v. Wen-

for taking insufficient bail, or other official neglect, resulting in a loss of the security of the replevin bond, is governed by the same standard and subject to the same limitation.¹ But, if the party for whose benefit the bond is made be entitled to only the possession of the property, the title being in the opposite party, such obligee is not entitled to recover the value of the property, but only of his possessory right.²

THE CONDITION FOR RETURN OF THE PROPERTY.—As replevin is a form of action to enable a plaintiff to recover specific personal property, if he fails to maintain his right to the possession after it has been delivered to him, there is fairness and equality in allowing a defendant at least an election to have it restored. Accordingly, instead of leaving to him a mere claim of damages, assessable on the broken condition to prosecute to effect, the law has wisely provided for a judgment of return, as well as a specific condition to the same effect in the bond. The judgment for return imposes the duty on the plaintiff to restore the property; and if not complied with, the condition for such return when adjudged, is also violated. If the plaintiff does not voluntarily execute the judgment for return, the defendant may, but is not obliged to avail himself of the writ of return to compel its execution. He may at once sue on the bond, unless a preliminary resort to the writ is required by statute.³

This provision for return of the same goods and chattels is intended for the benefit of the defendant.⁴ Thus construed, according to the import of the transaction of which the bond is a part, it is an indirect undertaking by the plaintiff, in consideration of being able, of his own motion, to get possession of the property in dispute at once, to return it if return be adjudged, and to pay to the defendant from whom he has wrested

ner, 3 Wend. 54; Gibbs v. Bartlett, 2 W. & S. 33; McCabe v. Morehead, 1 W. & S. 513; Arnold v. Bailey, 8 Mass. 145; Fraser v. Little, 13 Mich. 195; Balsley v. Hoffman, 13 Pa. St. 603.

¹ Evans v. Brandon, 2 H. Bl. 548; Baker v. Sorratt, 3 Bing. 56; Jeffrey v. Barnard, 4 A. & El. 823; Paul

v. Goodluck, 2 Bing. N. C. 220; Murdock v. Will, 1 Dall. 341.

² Hawley v. Warner, 12 Iowa, 42. See Buck v. Rhodes, 11 Iowa, 348; Hayden v. Anderson, 17 Iowa, 158.

³ Wright v. Quirk, 105 Mass. 44; Turner v. Turner, 2 Brod. & Bing. 107; Sevey v. Blacklin, 2 Mass. 541.

⁴ Gibbs v. Bartlett, 2 W. & S. 33.

it, such sum as ought to be assessed against the plaintiff for damages by reason of the premises, if he neglects to prosecute the suit, or it appears by an adverse judgment that he was not entitled to the property. Any such default is an event, on the happening of which he in form acknowledges himself bound to pay the penalty; but as the court will not allow the obligee to take more than in conscience he ought, damages assessed for the breaches are made to embrace the full redress to which such defendant, secured by such bond, is entitled.¹ The act of 11 Geo. 2 contained a clause that the court where such action shall be brought may, by rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance of the bond.²

THE CONDITION REQUIRED BY MODERN STATUTES.—Modern legislation on this subject has the merit of prescribing substantially equivalent conditions which are more precise and direct. In some, if not in most of the states, there are three conditions: first, to prosecute the suit to effect or to final judgment; second, to return the property if return be adjudged; and, third, to pay such sum as the defendant may recover judgment for in the replevin suit.

The action for breach of the condition to prosecute to final judgment proceeds in the absence of any determination of the merits of the replevin suit, and for failure to prosecute to judgment; but the breach of the condition to prosecute to effect, as we have seen, may consist not only of such a neglect, but also of an adverse judgment on the merits.³

¹ Wright v. Quirk, 105 Mass. 44.

² Turner v. Turner, 2 Brod. & Bing. 107.

³ Mills v. Gleason, 21 Cal. 274. In this case, Cope, J., said: "A dismissal stands on the same footing as a non-suit, leaving the parties to settle in an action upon the undertaking those matters which, if the suit were prosecuted, it would be necessary to determine in the first instance. Such matters include, of course, the right of the defendant

to a return of the property; and as the opportunity to obtain a return is taken away by the failure to prosecute, he is entitled to compensation in damages. A failure to prosecute is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained." Persse v. Watrous, 30 Conn. 139; Ladd v. Prentice, 14 Conn. 109.

The bond is intended to give the defendant in replevin complete indemnity for the property being taken out of his possession; and for the necessity imposed of active measures for the assertion of his right to it. He is entitled to no indemnity if he had no title or right of possession, and the possession is taken by one who has the right; and he can recover nothing beyond costs and nominal damages, even if the plaintiff fails to prosecute. And where the suit is prosecuted to judgment, if the defendant recovers, and the plaintiff performs the judgment, the bond is satisfied.¹ The purpose of indemnity is accomplished, if, when the defendant succeeds in the replevin suit, whether it is tried on the merits or not, the property is returned to him, the damages paid, whether they arise from deprivation of the use, deterioration, or decrease of market value, and the costs incident to making a defense. Where these damages have not been, and could not be, determined in the replevin suit, they may be determined in the action on the bond, if there is a breach of either of the conditions. There is no breach of the condition to prosecute to final judgment if the case is tried on the merits, though judgment be rendered for the defendant; then, if the other conditions are fulfilled by performance or execution of the judgment, the bond is satisfied. But the recovery of judgment by the defendant, whether on the merits or not, as well as the neglect of the plaintiff to prosecute the replevin suit with diligence, is a breach of the condition to prosecute to effect, and then the defendant may sue on the bond and rely on the breach of this condition, although in the former case the condition to return the property when adjudged may also be broken.²

NOT NECESSARY TO ASSESS THE DAMAGES IN THE REPLEVIN SUIT.—The obligee is entitled to recover the damages for the taking and detention in the action on the bond. The omission

¹ *Chambers v. Waters*, 7 Cal. 390; *Pettygrove v. Hoyt*, 11 Me. 66; *Hovey v. Coy*, 17 Me. 266; *Smallwood v. Norton*, 21 Me. 83; *Millett v. Hoyford*, 1 Wis. 401; *Claggett v. Richards*, 45 N. H. 360; *Clark v. Norton*, 6 Minn. 412; *Balsley v.*

Hoffman, 13 Pa. St. 603; *Genica v. Atwood*, 8 Cal. 446.

² *Brown v. Parker*, 5 Blackf. 291; *Gibbs v. Bartlett*, 2 W. & S. 33; *Roman v. Stratton*, 2 Bibb, 199. But compare *Wall v. Humphries*, 4 Dana, 209.

of the defendant in the replevin suit to have the damages assessed in that action, he being at liberty to have them there assessed, is no renunciation of them, if the judgment there rendered remains unsatisfied. And this rule has been applied when the only breach assigned was of the condition to return the property if adjudged. For it is said the statute contemplates that the property will be returned when such is the judgment, and the damages are then assessed upon that expectation. But where the property is not returned, and there is a breach of the bond, the statute does not prescribe how the damages shall be assessed. The general rule of law would give in such a case, as an indemnity, the value of the property at the time it was taken, and interest from that time to the time of trial.¹

WHEN SURETIES IN THE BOND NOT LIABLE FOR THE JUDGMENT IN THE REPLEVIN SUIT.—If there be no condition to pay any judgment that may be recovered in the replevin suit, a judgment there obtained for such damages, it has been held in Illinois, is not evidence against the sureties in an action on the bond. The non-payment of such a judgment would be no breach of the bond; nor would it measure the damages on any breach. The surety is not a party to an assessment in such a case, and as to him it is wholly inoperative. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of return is admissible, it must be evidence of what the damages in fact were, without reference to any former assessment.² But in Pennsylvania, it is held that the damages and costs for which the defendant in the replevin suit recovered judgment may be recovered on the bond.³

These damages, however, are not invariably the value and interest. As was said by Mr. Justice Rogers, "it would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his

¹Smith v. Dillingham, 33 Me. 384; Compare Swift v. Barnes, 16 Pick. Thomas v. Spofford, 46 Me. 408; 194.
Tuck v. Moses, 58 Me. 461; Wash-
ington Ice Co. v. Webster, 62 Me. 341; Hall v. Smith, 10 Iowa, 45. ²Shepard v. Butterfield, 41 Ill. 76.
³Miller v. Fouts, 2 Yeates, 418; Balsley v. Hoffman, 13 Pa. St. 603.

possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of his bond, by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition." Interest will compensate for delay to return mere merchandise; but if, while deprived of possession, it deteriorates by use or lapse of time, or by fall of the market, the owner is entitled to compensation for that loss.¹ If assessed in the action of replevin, and collected or paid, the same cannot again be collected on the bond.² And where the use of the property is valuable, the value of such use, rather than interest, is allowed as damages.³ The plaintiff cannot claim damages for depreciation, while he has possession, for he may always convert it into money.⁴ And undoubtedly the same principle would be applied to a defendant having possession.

It is an acknowledged rule that the party who is adjudged to return the property in controversy should, on general principles, be charged, in case of default, with its value, at the date when the duty to return it attaches.⁵ If it is of less value then than when taken, the difference should be compensated in damages, and they are recoverable on the bond as a breach of its conditions.

¹Stevens v. Truite, 104 Mass. 328; Howe v. Handley, 28 Me. 241; Parker v. Simonds, 8 Met. 211; Leighton v. Brown, 98 Mass. 515; Swift v. Barnes, 16 Pick. 194; Bank of Brighton v. Smith, 12 Allen, 243; Whitwell v. Wells, 24 Pick. 34; Crabb v. Mickle, 5 Ind. 145; Washington Ice Co. v. Webster, 62 Me. 341; Schrader v. Wolfen, 21 Ind. 238; Walls v. Johnson, 16 Ind. 374; Hopkins v. Ladd, 35 Ill. 178; Story v. O'Den, 23 Ind. 326; Lutes v. Alpaugh, 23 N. J. 165; Caldwell v. West, 21 N. J. L. 411; Cohen v. State, 34 Miss. 179; Ormsbee v. Davis, 18 Conn. 555; Emerson v. Booth, 51 Barb. 40; Mattoon v. Pearce, 12 Mass. 406; Rowley v. Gibbs, 14 John. 385.

²Rowley v. Gibbs, *supra*.

³Allen v. Fox, 51 N. Y. 562; Dorsey

v. Gossaway, 2 H. & J. 402; Butler v. Mehrling, 15 Ill. 488. In Tibbles v. O'Connor, 28 Barb. 538, it was held that the sureties were responsible not only for the costs of the suit in the trial court, but also for costs of an appeal to the general term. And in Letson v. Dodge, 61 Barb. 121, it was held that parties in an undertaking in a justice's court, are responsible for the final result in the court of last resort. It is held in New Hampshire, that the replevin bond prescribed by the statute does not extend to a judgment on a review of the action. Bell v. Bartlett, 7 N. H. 178.

⁴Gordon v. Jenny, 16 Mass. 465.

⁵Swift v. Barnes, 16 Pick. 194; Parker v. Simonds, 8 Met. 211.

EVIDENCE OF THE VALUE.—This result has sometimes been accomplished by permitting the obligee to put in evidence the estimate of value stated in the bond; and the court holding the obligors bound by that value. The plaintiff is held bound by it, because it is his own valuation, and the sureties, by executing the bond, admit the same.¹ The other party, however, is not bound by that valuation; and if it is greater at the time when the judgment for return is pronounced, he is at liberty to show its actual value at that time.² If the value has

¹Huggeford v. Ford, 11 Pick. 223; Middleton v. Bryan, 3 M. & S. 155; Swift v. Barnes, 16 Pick. 194; Howe v. Handley, 28 Me. 241; Parker v. Simonds, 8 Met. 211; Gordon v. Jenny, 16 Mass. 469; Tuck v. Moses, 58 Me. 461; Washington Ice Co. v. Webster, 62 Me. 341; Leighton v. Brown, 98 Mass. 515; Wright v. Quirk, 105 Mass. 44; Gibbs v. Bartlett, 2 W. & S. 33.

²Id. In Parker v. Simonds, supra, Hubbard, J., referring to Swift v. Barnes, said: "In that case a quantity of sperm oil was replevied, and there was judgment for a return, and a writ of restitution issued, and a demand was made of the property, but it was not delivered. The question made by the parties was, whether the valuation in the bond should be the measure of damages, or whether judgment should be rendered for the actual value of the oil at the time of the service of the writ of replevin, or when the verdict was given, or on the rendition of judgment, or at the date of the demand upon the writ of restitution. The oil having risen in value after it was replevied, it was argued by the plaintiff that the value of the oil at the time of the rendition of judgment, or at the time of the demand made on the writ, was the rule to be adopted; while it was contended by the defendant that the value of the

oil at the time of the original taking should determine the amount of damages, and that the circumstance that a bond had been given should make no difference. The court, after a review of the authorities cited, was of opinion that the value of the property replevied, at the time it was demanded on the writ of restitution, was the true measure of damages; and Mr. Justice Wilde, who gave the opinion, referred to the general rule of damages on all contracts to deliver goods on demand, and expressed the opinion that there was no essential difference between this contract and the common one to deliver goods. And the court further held, that the party who made the bond and fixed the value, might well be bound by it, as was decided in Gordon v. Jenny, 16 Mass. 465; and that it did not follow that the other party, who had no agency in fixing the amount, should be concluded by it, because the property had risen in value. But a leading feature in that decision is this, namely, that the party injured was entitled to an indemnity, and could not receive it, unless the actual value of the goods, at the time of the demand made, was adopted as the rule to fix the measure of damages. But though the court states the rule by which the damages are to be ascertained, in strong and general

increased in the possession of the obligor by an advance in the market price since the time of default, in complying with the judgment of return, the obligee is entitled to the benefit of the enhanced value.¹ But if the value has been increased by the labor bestowed upon it in good faith by the party who retained the possession, it is otherwise.²

THE DAMAGES RECOVERABLE ON THE BOND.—Exclusive of the value of the goods, in default of a return, or in place of a return, the damages secured by the bond ordinarily consist of interest upon the money value of the goods, if fixed at the time of the taking, computed up to the time of the verdict, and any special damage shown to result directly from the taking, in addition.³ The expenses of procuring teams and appurtenances actually incurred for the purpose of removing the property, which were rendered useless by the wrongful suing out of the replevin, may be included in such damages.⁴ But it has been held that the plaintiff in the action on the bond cannot recover for the fees paid his lawyer in the replevin suit, nor compensation for his own attendance at court in that suit, nor

terms, yet it does not embrace every case arising under the process of replevin; and the case at bar is one of those which are to be excepted from its operation. The goods replevied consisted of household furniture, horses, cattle, wagons, etc., which had been more or less used. At the time of the demand, some of them had been sold, and others were deteriorated and much depreciated in value by further use. They were not all of them goods, like oil or other articles of merchandise, of a current market price; and some having been sold, and others thus deteriorated, the value at the time of the demand could not be ascertained; nor would that value be the measure of damages, without a proper allowance for the depreciation, which, under the circumstances of this case, could not be computed upon any accurate

data. The only mode, therefore, to give the plaintiff the indemnity to which he is entitled, is to take the estimate of value as set out in the replevin bond. To this is to be added six per cent. on such value from the time of the judgment in the action of replevin. It not sufficiently appearing but that the plaintiff might have had his writ of return immediately, or have put his bond in suit, he is not entitled to the penal damages since that time." But see *West v. Caldwell*, 23 N. J. L. 736.

¹ *Tuck v. Moses*, supra.

² *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; *Herdic v. Young*, 55 Pa. St. 176.

³ *Stevens v. Truite*, 104 Mass. 324; *Davis v. Crow*, 7 Blackf. 129.

⁴ *Washington Ice Co. v. Webster*, 62 Me. 341.

his lawyer's fees paid in the suit on the bond.¹ In Alabama, it has been ruled otherwise as to the first item.²

EFFECT OF THE JUDGMENT IN REPLEVIN SUIT.—As has been before stated, in many of the states the bond or undertaking is conditioned for the payment of any judgment which the defendant may recover against the plaintiff in the action of replevin. The obligors in such a bond contract specially in reference to a judgment in that action, and nothing short of full satisfaction of the judgment against the principal will satisfy it.³ If there is an assessment of damages in the replevin suit, it constitutes, with the costs adjudged in that action, a substantive item to be recovered in the action on the bond, and interest thereon will be computed from the date of that judgment.⁴ When the right of property is put in issue in the replevin suit, and determined by final judgment, it is *res adjudicata*, and cannot, on general principles, be again inquired into between the same parties. And the sureties in the bond are also concluded by it when their obligation is to return the property if it is adjudged, and to pay any judgment recovered. If, however, the right has not been tried, nor the value adjudged to the defendant, the extent of his interest, and the amount he is entitled to recover on account of it, are, of course, open questions in an action on the bond.⁵

¹ Davis v. Crow, 7 Blackf. 129; Kenly v. Commonwealth, 6 B. Mon. 583.

² Miller v. Garrett, 35 Ala. 96; Ferguson v. Baker, 24 Ala. 402; Hudson v. Young, 25 Ala. 376; Garrett v. Logan, 19 Ala. 344.

³ Hicks v. McBride, 3 Phil. (Pa.) 377.

⁴ Swift v. Barnes, 16 Pick. 194; Hopkins v. Ladd, 35 Ill. 178; Caldwell v. West, 21 N. J. L. 411; Washington Ice Co. v. Webster, 62 Me. 341; Leighton v. Brown, 98 Mass. 515; Mattoon v. Pierce, 12 Mass. 406; Ormsbee v. Davis, 18 Conn. 555.

⁵ Wallace v. Clark, 7 Blackf. 298. In Warner v. Matthews, 18 Ill. 83,

Skinner, J., thus discusses the effect of the judgment for the defendant in the action of replevin, which was rendered on the trial of an issue denying the plaintiff's title. He said: "The judgment in the action of replevin necessarily determined that the plaintiff in that (the defendant in this action) was not entitled to the possession of the property, and that the defendant in that action (the plaintiff in this action) was entitled to a return thereof; and to that extent, and no further, are the rights of the parties concerning the property, and the ownership thereof, conclusively adjudged and determined. Whatever was in issue in

A judgment for return, even upon a non-suit, not complied with, will sustain an action on the bond for at least nominal damages; for to that extent the judgment is imperative and conclusive.¹

WHAT MAY BE SHOWN IN DEFENSE.—And where a judgment for the value in lieu of a return, by the election of the defendant, is regularly taken; or in the alternative in case return cannot be had, such judgment is absolute, whether rendered on the merits or not.² But a mere judgment for return without trial of an issue of such scope as to embrace a determination of the extent or value of the defendant's interest, will not preclude inquiry upon that subject, in an action on the bond. In the suit on the bond, the obligors may avail themselves of any fact which the plaintiff in replevin is not estopped by the judgment therein from setting up, in order to limit the sum for which recovery shall be had.³ The fact that the replevin suit was defeated because prematurely brought;⁴ that the plaintiff is mere trustee, representing claims not sufficient to absorb the entire value;⁵ or any other fact which would show that the replevin was defeated on some technical ground, or that the defendant in replevin had

that action, *and essential* to be found, to authorize the judgment, and was in fact determined as between the parties, is *res judicata*, and conclusive upon them. The defendant in that action was entitled to judgment upon either of the issues asserting property in himself, and denying the plaintiff's right; and to prove these issues on the part of the defendant, it was only necessary to show that the plaintiff had not the right of possession, or that the defendant had a special interest in the property, entitling him to the present possession. The general ownership of the property was not therefore necessarily determined. *Anderson v. Talcott*, 6 Ill. 365; *King v. Ramsey*, 13 Ill. 619; 1 Greenlf. Ev. § 332." *Hawley v. Warner*, 12 Iowa, 42.

¹ Id.; *Buck v. Rhodes*, 11 Iowa, 348; *Hayden v. Anderson*, 17 Iowa, 158.

² Id.; *Davis v. Harding*, 3 Allen, 302.

³ *Leonard v. Whitney*, 109 Mass. 265; *Denny v. Reynolds*, 24 Ind. 248; *Wallace v. Clark*, 7 Blackf. 298; *McKelvy v. McLean*, 34 Upper Can. C. P. 635; *Walter v. Warfield*, 2 Gill, 216; *Mason v. Sumner*, 22 Md. 312; *Ormsbee v. Davis*, 18 Conn. 555; *Pacand v. McEwan*, 31 Upper Can. C. P. 328; *Stockwell v. Byron*, 22 Ind. 6; *Bell v. Worthington*, 3 Gill & J. 252; *Dugan v. Tyson*, 6 Gill & J. 458; *Cumberland Coal Co. v. Tilghman*, 13 Md. 74.

⁴ *Davis v. Harding*, 3 Allen, 302; *Martin v. Bailey*, 1 Allen, 381.

⁵ *Howe v. Handley*, 28 Me. 241.

but a temporary or partial right, may be shown, and the amount recoverable for the value will be limited accordingly.¹

¹ *Simpson v. McFarland*, 18 Pick. 427; *Whaler v. Train*, 4 Pick. 168; *Flagg v. Tyler*, 6 Mass. 33; *Mattoon v. Pearce*, 12 Mass. 406; *Bartlett v. Kidder*, 14 Gray, 449; *Ware River R. v. Vibbard*, 114 Mass. 458; *Leonard v. Whitney*, 109 Mass. 265; *Wilham v. Wilham*, 57 Me. 447; *Walter v. Warfield*, 2 Gill, 216; *Tuck v. Moses*, 58 Me. 461; *Hacker v. Johnson*, 66 Me. 21; *Hayden v. Anderson*, 17 Iowa, 158; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Russell v. Butterfield*, 21 Wend. 30; *DeWitt v. Morris*, 13 Wend. 496; *Wallace v. Clark*, 7 Blackf. 298.

In *Mason v. Sumner*, 22 Md. 312, *Bowie, C. J.*, said: "The first and second exceptions raise the question of how far the judgment in the action of replevin concludes the obligors in the bond. The appellant contends that wherever the title to property is in issue, or might have been in issue, in the original proceedings, that question becomes *res adjudicata*, and cannot afterwards, in any subsequent proceedings, be inquired into; he assimilates this to a case of *sci. fa.*, where any defense which might have been pleaded to the original action cannot be set up against the *sci. fa.*

"In the case of *Belt v. Worthington*, 3 Gill & J. 252. *Archer, J.*, declared that 'the object of the law in prescribing that a replevin bond shall be entered into by a plaintiff before he should have the benefit of the writ, was only to give indemnity to the defendant. If, in truth, he had no right to the property at the time of the institution of the suit, the rejection of the evidence, by putting it in his power to recover the value of the goods, would enable

him to overreach a just measure of indemnity, and inflict a penalty which the law never contemplated.' Repudiating the analogies sought to be established, in that case, to judgments by default in actions on appeal bonds and money contracts, he said the action of replevin was '*sui generis*,—the recovery on the replevin bond ought to be moulded in such manner as will best subserve the principles of justice. . . . The question (of the admissibility of evidence) must always be regulated by reference to the rights decided in the action, and the nature and character of the bond.' In this case, the obligors in the replevin were permitted, after non-suit in replevin and judgment by default on the bond, to show, in mitigation of damages, that they had title to the articles replevied. The same general principle is announced by *Stephens, J.*, in the case of *Dugan v. Tyson*, 6 G. & J. 458. This principle is exemplified most strongly in the case of *Walter*, for use of *Walter, v. Warfield et al.* 2 Gill, 216, where, after judgment upon verdict rendered on pleas of *non cepit*, and property in the defendant, and judgment for return of the property, in the action of replevin, upon an action on the replevin bond, against the obligors, the plaintiffs in the action of replevin, as defendants in the action on the bond, were permitted to show, in mitigation of damages, that the property was not in the defendant in the first action and plaintiff in the second. This case was argued before *Archer, Dorsey, Chambers and Spencer, JJ.*, and affirmed without dissent. In the more recent case of the *Cumberland*

WHEN PLAINTIFF ONLY ENTITLED TO RECOVER AS SPECIAL OWNER.— But the cases in which a defendant in replevin will be limited to the value of his special interest, are those in which the other party is the general owner or represents him, or has made

Coal Co. v. Tilghman, 13 Md. 74, the same doctrine is forcibly expressed. The theory of the action of replevin is thus defined by the learned judge, who, delivering the opinion of the court in this case, says: 'In this state, the action is most *generally* resorted to for the purpose of trying the right of possession at the time of issuing the writ, and not to determine necessarily the *absolute* title to the property for all time. And this being so, it follows that if the plaintiff, at the time of bringing the suit, has the right to the possession, he must succeed; or, if he have it not, that his action must be defeated. Whoever is entitled to the possession, whatever may be his title in other respects, may maintain or defeat the action of replevin. His right to success in the action of replevin depending entirely on his right of possession, in reason it follows that his title to damages must be confined to the extent of interference with that possession. If the right to possession covers all time, or is limited to a determinate period, the damages will be accordingly graduated, as the case may be. In the case now before this court, the effort on the part of the defendants was to show, as alleged by them, in mitigation of damages, title in the Cumberland Coal & Iron Co. Now, this they could not do, because that question was decided in the replevin suit. It was, however, competent to them to show that, although the defendant in the replevin suit had title to the possession of the boat at the time of the judgment rendered

in his favor; yet that title was of but short duration, and terminated by contract in a short time after that judgment. No such evidence was offered to the court below.' It is obvious, from the theory and illustration given in the above extract, that the judgment in replevin does not conclude the obligors in the bond from proving by the proceedings in the cause, or *aliunde*, the character of the possessory right upon which the plaintiffs in the action on the bond recovered in the replevin suit. If, from these, it appears that the relation between the parties to the action in replevin was that of landlord and tenant, cultivating or renting on shares, and that the subject of replevin was the crop then growing upon the farm of the landlord; such evidence shows a qualified property, or joint right of possession, which would defeat the action of replevin by the tenant, and at the same time diminish the claim of damages on the part of the landlord, founded on his *prima facie* right to the value of the appraisement, showing that he was entitled to but a moiety of the same. Such evidence was proper to rebut the '*prima facie*' title of the plaintiff on the bond. His right to damages must be confined to the extent of his ownership over the property replevied. If, as joint owner of the property, he was entitled to such possession as precluded his tenant from replevying, and secured him a judgment of *retorno habendo*, yet his title was not so absolute and entire as to entitle him to recover of the principal and surety the full

reparation to him.¹ In an action of replevin brought by a mere stranger to the title, who never had possession until he obtained it by the writ, on a judgment for return, or in an action on his bond for breach of the condition to return the property, recovery may be had for the full value, although the party so recovering, as between him and the general owner, has but a possessory right.² Where a bond in accordance with the practice prescribed by statute is conditioned to return the property if adjudged, and to pay any judgment that the defendant may recover against the plaintiff in the replevin suit, it obviously extends and will be limited to such judgment as the statute then

value of the property, or more than the value of his share of the crops. If we are correct in these premises, it necessarily follows that the prayer offered on the part of the appellant was not proper, since it required the court to instruct the jury that the appraisal was the measure of damages; this, we have seen, was but *prima facie* evidence, subject to be rebutted by such testimony as was offered on the part of the appellee."

In *Smith v. Lisher*, 23 Ind. 500, the proceedings in the action of replevin were put in evidence, and in that action the court found "the property mentioned in said complaint and writ of replevin in said defendant, and that he have possession thereof;" and it was held that the finding and judgment was conclusive between the parties to the suit on the bond, as to the right of property, and precluded any proof of title thereto in a stranger, in mitigation; but in *Stockworth v. Byron*, 22 Ind. 6, it was held that, if the title was not tried in the replevin suit, title in a stranger may be shown to reduce the recovery to nominal damages.

¹*Dilworth v. McKelvey*, 30 Mo. 149; *Rhoads v. Woods*, 41 Barb. 471; *Seaman v. Luce*, 23 Barb. 240; *Noble*

v. Epperly, 6 Ind. 468; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Weaver v. Darby*, 42 Barb. 441; *Buck v. Remsen*, 34 N. Y. 383.

²*Russell v. Butterfield*, 21 Wend. 30; *First National Bank v. Crowley*, 24 Mich. 492; *Woodman v. Nottingham*, 49 N. H. 387; *Littlefield v. Biddleford*, 29 Me. 310; *Fallon v. Manning*, 35 Mo. 271; *Frei v. Vogel*, 40 Mo. 149; *White v. Webb*, 15 Conn. 302; *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Green v. Clark*, 12 N. Y. 343; *Brizee v. Maybee*, 21 Wend. 144; *Kennedy v. Whitwell*, 4 Pick. 466; *Van Baalen v. Dean*, 27 Mich. 104; *Stanley v. Gaylord*, 1 Cush. 536; *Farnham v. Moor*, 21 Me. 508; *Mattoon v. Pierce*, 12 Mass. 406; *Flagg v. Tyler*, 6 Mass. 33.

In *Hanna v. International Petroleum Co.* 23 Ohio St. 622, it was held in an action of replevin brought against a party having possession of the property as agent, that the principal might be substituted in his place without releasing the sureties in the replevin bond — that they stand bound for the indemnity of the new party equally as though he had been the original and only defendant — it was held to be no prejudice to the plaintiff in the replevin suit. Compare *Walter v. Warfield*, 2 Gill, 216.

in force provides for. Then, if the statute gives a defendant who recovers judgment by non-suit or discontinuance an absolute right to a return, or in lieu thereof, at his election, a judgment for the value, in addition to damages for detention, the bond will cover any judgment for the value so recovered; and especially if the statute provide that in a suit on the bond the amount for which judgment is recovered in the action of replevin shall be the measure of damages, these cannot be reduced or increased by proof of any facts antecedent to the judgment.¹ But if, under the code practice, a judgment for return is rendered, but there is no adjudication of the value to be paid or collected in case delivery of the property cannot be had, the obligee is, nevertheless, entitled to recover the value on the undertaking or bond.² The condition is absolute to return the property if adjudged, and damages may be assessed on it,

¹ Williams v. Vail, 9 Mich. 162.

² Whitney v. Lehmer, 26 Ind. 503.

In this case, Frazer, J., said: "It is clearly not a void judgment; and the question is, what are the liabilities of the obligors in the replevin bond, who undertook that the plaintiff in that suit would return the property if such a return should be adjudged, as it has been. Is the defendant in that suit precluded from recovering the actual damages which resulted to him, merely because the jury in that case failed to find the value of the property? . . . In the absence of any direct authority, the case must find its solution in such general rules of the law as seem to be applicable to it. It will be noticed that the statute under examination contains no negative words, nor does it purport to prescribe a mode by which a remedy may be obtained upon the bond, or the tribunal where that remedy shall be sought. It does not even regulate the practice in a suit upon the bond; it is the practice in the replevin suit only which it prescribes. We have, then, a valid bond; its

conditions broken; what is the measure of damages for breach of the condition to return the property? The answer furnished in all the cases ever decided, when no statute interfered, is the value of the property at least; this value to be shown as in ordinary cases involving an inquiry as to value. The case is not one where the statute creates a new right, giving a particular remedy therefor. In such a case the statutory remedy is the only one. But this is a right of action arising by the common law, out of a breach of the contract; and if the statute gives a remedy without negative words, the common law remedy still remains, and may be pursued at the plaintiff's option. An assessment of the value of the property, in the replevin suit, and a judgment in the alternative for its return or its value, would, as evidence, undoubtedly have bound the parties upon the question of value, for the reason that it would have been a judicial determination of that question by a tribunal having that authority, putting it at rest forever. But it does

unless it is satisfied by performance of other conditions. Where, however, a judgment regulated by the code is rendered absolutely for the value and not as an alternative, if delivery of the property cannot be had, the liability of the sureties for that judgment is not so clear.¹

BOND BY DEFENDANT TO RETAIN THE PROPERTY.—The defendant is permitted in many jurisdictions to prevent the delivery of replevied property to the plaintiff, by giving bond substantially like that required of the plaintiff, except the condition to prosecute the suit. The measure of damages, of course, will be the same for breach of like conditions.² The costs of the action of replevin cannot be recovered on this bond;³ nor the damages to the property while in the defendant's possession, if accepted by the officer on the writ of return, unless the bond is conditioned to pay any judgment recovered against the defendant, and a judgment is recovered for such damages.⁴

not follow that the absence of such assessment and judgment shall have the practical effect of a finding and judgment that the property was of no value, or that no other tribunal shall examine the question. Common justice, as well as reason, would be shocked by the announcement of such a doctrine. The statute does not so declare, either in terms or by any implication which the recognized rules of construction will warrant. Grant that the plaintiffs had the right to have the verdict of the jury which tried the replevin suit, upon the question of the value of the property. They should have asserted that right, and failing to do so then, when they should have acted, shall they do so now when it is impossible for their adversary to obtain that verdict? Nor can the surety . . . be deemed to be in any better position than his principals. His liability is co-extensive

with theirs. Nothing has been done to work his discharge, if it be conceded that his principals are yet bound."

¹ *Gallarati v. Orser*, 27 N. Y. 324; *Asley v. Peterson*, 25 Wis. 621; *Nickerson v. Chatterton*, 7 Cal. 568; *Clary v. Rolland*, 24 Cal. 147; *Mason v. Richards*, 12 Iowa, 74; *Lomme v. Sweeny*, 1 Montana, 584.

² In *Tibbol v. Cahoon*, 10 Watts, 232, the plaintiff gave bond, with surety, to prosecute the suit to effect, and without delay, and to return the property if adjudged; the defendant gave a counter bond, and retained the property. Afterwards, arbitration awarded no cause of action. It was held that the plaintiff's sureties were liable for costs in the replevin suit.

³ *Lutes v. Alpaugh*, 23 N. J. L. 165.

⁴ *Douglass v. Douglass*, 21 Wall. 98.

SECTION 6.

ATTACHMENT AND FORTHCOMING BONDS.

Attachment bonds—The damages recoverable—What may be shown in defense—Costs and expenses, including attorney fees, may be recovered—Forthcoming bonds—The measure of damages thereon—Condition to pay the judgment.

ATTACHMENT BONDS.—Attachment bonds and undertakings are statutory obligations, differing somewhat in form in the different states, but for the most part, substantially the same in legal effect. They are generally conditioned that the obligors will pay all damages which the defendant in the attachment suit may sustain by reason of the attachment, if the plaintiff shall fail to recover judgment, or by reason of the wrongful suing out of the attachment. By “wrongful,” as used in the statutes, and in obligations made under the same, is meant, unjustly, injuriously, tortiously, in violation of right.¹ The condition of the bond is violated if the causes alleged for attachment do not exist, although the party suing it out may have believed in their existence.²

It is held, in Kentucky, that mere failure to succeed in the attachment suit will not forfeit the attachment bond, but it must be shown that it was wrongfully obtained; that is, without just cause; and in case of a non-suit or an abandonment of the suit, this would not necessarily appear.³

THE DAMAGES RECOVERABLE.—And it has also been held, in the same state, that the damages in the action on such an obligation cannot be enhanced by proof of malice. If an attachment has been obtained without just cause, the terms of the bond secure to the defendant in the attachment all costs and damages that he has sustained in consequence thereof. The condition is satisfied, and its terms substantially complied with, by awarding him damages adequate to the injury to the property attached and the loss arising from the deprivation of its

¹ Raver v. Webster, 3 Iowa, 502.

² Pettit v. Mercer, 8 B. Mon. 51.
But see Manke v. Damon, 3 Iowa, 107.

³ Pettit v. Mercer, supra; Cooper v. Hill's Adm'r, 3 Bush, 219. See Young v. Broadbent, 23 Iowa, 539.

use, together with the costs and actual expenses incurred. It was considered that the legislature did not intend to impose on the security in the bond a more extensive liability. The plaintiff is not bound to show malice, nor can the defendant rely for defense on probable cause.¹

But in Iowa, it is provided by statute that in an action on such a bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true; and may recover the actual damages sustained, and reasonable attorney's fees, to be fixed by the court; and if it be shown that such attachment was sued out maliciously, he may recover exemplary damages.²

In Tennessee, on a bond conditioned to prosecute the suit to effect, and in case of failure therein to pay the defendant all such costs and damages as shall be awarded and recovered in any suit or suits which may afterwards be brought for wrongfully suing out such attachment, suit may be brought in the first instance on the bond, without first suing in case for a malicious and groundless action; and recovery may be had not only for such damages as are recoverable in a common law action—actual and vindictive,—but without showing malice, actual damages may be recovered.³

The actual damages have generally been stated to be the injury to the plaintiff by being deprived of the use of his property, or its loss, destruction or deterioration, together with the costs and expenses incurred by him in the defense of the suit.⁴ Where a stock of goods is attached, damages for interruption of the owner's business may be recovered, as well as reasonable costs and expenses incurred in procuring the discharge of the attachment and restoration of the property. But damages to the reputation of goods, caused by the levy of an attachment thereon, are too vague and uncertain to be capable of legitimate proof.⁵ So, injury to the credit and reputation of

¹ *Pettit v. Mercer*, *supra*.

² Code of 1873, § 2961.

³ *Smith v. Eakin*, 2 *Sneed*, 456.

⁴ *Reidhar v. Berger*, 8 *B. Mon.* 160;
Pettit v. Mercer, *supra*; *Campbell v.*
Chamberlain, 10 *Iowa*, 337; *Frankel*

v. Stern, 44 *Cal.* 168; *Bruce v. Coleman*, 1 *Handy (Ohio)*, 515; *Alexander v. Jacoby*, 23 *Ohio St.* 358.

⁵ *Alexander v. Jacoby*, *supra*;
Moore v. Schultz, 31 *Md.* 418.

the party proceeded against by attachment has generally been held too remote and speculative.¹ Where malice is properly charged, however, such damages have been allowed.² To enhance the damages, it is admissible to show that the property attached was designed for a special use, which being thwarted by the attachment, the value of the property has been materially lessened.³ Depreciation of the attached property while in the officer's hands is a legitimate subject of inquiry with a view to damages therefor;⁴ but only when the property is personal of which the officer takes possession. There can be no recovery for a depreciation of real estate while subject to the attachment.⁵

WHAT MAY BE SHOWN IN DEFENSE.—If the property is taken out of the hands of the attachment defendant, and an action on the bond accrues, the obligors are *prima facie* liable for the value.⁶ The return of it, however, or its subsequent lawful seizure by the same officer, on execution or other authority against the owner, and its appropriation to pay his debt for which the officer was empowered to make seizure, will go in mitigation.⁷ Where the possession of the attachment defendant has not been disturbed, he is still entitled to recover on the bond for any intermeddling with it.⁸ Damages for being deprived of the use of property does not embrace consequential and secondary losses. Thus, where a lot of merchandise was levied on, but, on the failure of the case, restored, it was held in an action on the bond that a loss to the plaintiff resulting from the attachment, on his license to vend goods, and the services of himself and wife during the pendency of the suit, should have been excluded from the consideration of the jury; that the inquiry in regard to the injury which the party sus-

¹ Campbell v. Chamberlain, 10 Iowa, 337; Pettit v. Mercer, 8 B. Mon. 51; Heath v. Leab, 1 Cal. 410. See Lawrence v. Hagerman, 56 Ill. 68.

² Donnell v. Jones, 11 Ala. 689.

³ Carpenter v. Stevenson, 6 Bush, 259.

⁴ Frankel v. Stern, 44 Cal. 168; Meshke v. Van Doren, 16 Wis. 319; Fleming v. Bailey, 44 Miss. 132.

⁵ Heath v. Lent, 1 Cal. 410.

⁶ Dunning v. Humphrey, 24 Wend. 31.

⁷ Earle v. Spooner, 3 Denio, 246; Bennett v. Brown, 31 Barb. 158; S. C. 20 N. Y. 99. See Wanamaker v. Bowers, 36 Md. 42.

⁸ Dunning v. Humphrey, 24 Wend. 31. Compare Groat v. Gillesby, 25 Wend. 383.

tained by being deprived of the use of his property should be limited to the actual value of the use; as, for example, the rent of real estate, the hire or services of slaves, or the value of the use of any other species of property, in itself productive. If not of that character, the injury from being deprived of the use should be restricted to interest upon the value.¹

And where an attachment was levied upon a house which was being taken to pieces for removal to and erection upon other premises, damages were not permitted to be recovered on the bond for injury to furniture by exposure in consequence of the plaintiff being prevented or delayed by the attachment from rebuilding the house; nor for the additional expense of reconstructing the house. The value of the use, it was said, must be predicated upon the condition of the property when it was attached, and not upon what its condition was before, or what it was intended to be in the future.² A very restricted rule of liability was here announced and applied; and it is certain that unless considerably expanded it would often prevent the recovery of reasonable and fair compensation. Suppose an important part of a mill to be detached for some temporary purpose, necessitating the stoppage of the mill and the work of all the laborers and all the other dependencies; and when it is about to be put in place again it is taken under an attachment; is the value of its use to be estimated according to its condition when attached, without regard to what its condition had been, or what it was intended to be in the future?

COSTS AND EXPENSES, INCLUDING ATTORNEY FEES, MAY BE RECOVERED.—The costs and expenses of defending against the attachment, procuring its discharge, and the restoration of the property, may be recovered as part of the damages on such a bond.³ Such damages also include costs upon a *certiorari* on which a judgment for the plaintiff in the attachment was re-

¹ Reidhar v. Berger, 8 B. Mon. 160. See Alexander v. Jacoby, 23 Ohio St. 358.

² Plumb v. Woodmansee, 34 Iowa, 116.

³ Dunning v. Humphrey, 24 Wend. 31; Groat v. Gellesby, 25 Wend. 383;

Pettit v. Mercer, 8 B. Mon. 51; Burton v. Smith, 49 Ala. 293; Alexander v. Jacoby, 23 Ohio St. 358; Schuyler v. Sylvester, 28 N. J. L. 487; Bruce v. Coleman, 1 Handy (Ohio), 515; Northrup v. Garrett, 17 Hun, 497.

versed.¹ The right to recover for reasonable attorney fees paid or incurred in obtaining a discharge of the attachment rests upon the same principle as the other costs and expenses incurred for the same purpose.²

FORTHCOMING BONDS.—These are usually conditioned for the delivery of the property to the officer to satisfy the judgment or execution which the plaintiff in an attachment may obtain in the cause, or when and where the court may direct. Sometimes the alternative is embraced of the delivery of the property, or the satisfaction of the judgment recovered in the action.³

The right of action is complete on the failure to deliver the property at the stipulated time.⁴ A surety may exonerate himself by delivering the property to the officer at any time before judgment is rendered against him on the bond.⁵

THE MEASURE OF DAMAGES THEREON.—The measure of damages is the value of the property stipulated to be forthcoming, with interest from the time delivery became due, not exceeding the amount of the judgment in the attachment suit.⁶ But this

¹Bennett v. Brown, 20 N. Y. 99; S. C. 31 Barb. 158.

²Barton v. Smith, 49 Ala. 293; Northrup v. Garrett, 17 Hun, 497; Seay v. Greenwood, 21 Ala. 491; Swift v. Plessner, 39 Mich. 178; Ah Thaie v. Quan Wau, 3 Cal. 216; Prader v. Grim, 13 Cal. 585; Higgins v. Mansfield, 62 Ala. 267. In this case it was held the reasonable amount paid or promised to be paid to attorneys for defending the attachment suit, and the value of time lost, and expenses incurred, in attending court for the trial, may be recovered in an action on the bond for the wrongful and vexatious suing out of the attachment.

And also that damage resulting from the demoralization of the plaintiff's workmen, while he was absent from his farm, and procuring attorneys to defend the suit; or from the plaintiff's being compelled

to stop a double plow while he was absent, are too remote, and should not be estimated in fixing the value of the plaintiff's services. Morris v. Price, 2 Blackf. 457; Plumb v. Woodmansee, 34 Iowa, 116. In Iowa they are expressly allowed by statute, where there was no reasonable cause to believe the ground upon which the same was issued to be true. *Code of 1873*. Behrens v. McKenzie, 23 Iowa, 333. But see Littleton v. Frank, 2 Lea (Tenn.), 300.

³Drake on Attach. § 327.

⁴Naynant v. Dodson, 12 Iowa, 22.

⁵Reagan v. Kitchen, 3 Martin, 418; Hansford v. Perrin, 6 B. Mon. 595. See Payne v. Joyner, 7 Ark. 462.

⁶Collins v. Mitchell, 3 Fla. 4; Moon v. Story, 2 B. Mon. 354; Weed v. Dills, 34 Mo. 483; Jones v. Hays, 27 Tex. 1; Marshall v. Bailey, 27 Tex. 686.

value should be computed subject to any paramount lien.¹ Where a seizure was made, under an attachment, of property upon which the party having it in possession had a lien; and he procured a release of it by giving a forthcoming bond, it was held his lien was not thereby divested; and he was held responsible on the bond only for the balance that remained in his hands after paying himself.² If the value be stated in the bond, it will be conclusive on the obligors; otherwise it must be proved.³ It is no defense that the property was not the defendant's.⁴ The condition of the bond requires the property to be returned in a condition to be taken and disposed of in the satisfaction of the judgment. A mere physical return of it is not sufficient if it be incumbered after the execution of the bond.⁵

CONDITIONS TO PAY THE JUDGMENT.—A bond that the obligors will satisfy the judgment cannot be satisfied by surrender of the property attached;⁶ nor by pointing out property of the judgment debtor from which the judgment could be collected, even though the money to pay the expenses and charges of the proceedings is tendered.⁷ It is no defense to show that the property attached did not then belong to the defendant;⁸ or that it was not subject to attachment;⁹ or was worth less than the judgment.¹⁰ The judgment is the measure of damages irrespective of the value of the property or the ownership.¹¹

¹ Canfield v. McLaughlin, 10 Martin, 48.

² Id.

³ Moon v. Story, 2 B. Mon. 354; Weed v. Dills, 34 Mo. 483.

⁴ Sartin v. Weir, 3 Stew. & Port. 421; Waterman v. Frank, 21 Mo. 108; Gray v. McLeal, 17 Ill. 404; Dorr v. Clark, 7 Mich. 310.

⁵ Schuyler v. Sylvester, 28 N. J. L. 487

⁶ Dorr v. Kershaw, 18 La. 57.

⁷ Hill v. Merl, 10 La. 108.

⁸ Dorr v. Clark, 7 Mich. 310; Beal v. Alexander, 1 Rob. (La.) 277; Hazelrigg v. Donaldson, 2 Met. (Ky.) 445.

⁹ McMillan v. Dana, 18 Cal. 339.

¹⁰ Phanstiesh v. Vanderhoof, 22 Mich. 296.

¹¹ Id.; Morange v. Edwards, 1 E. D. Smith, 414.

SECTION 7.

INJUNCTION BONDS.

Scope of obligation — Costs and expenses; attorney fees — Damages for the restraint of the injunction — What facts no defense — What may be shown in defense.

SCOPE OF OBLIGATION.— These are statutory obligations, and though various in their phraseology, they have a general similarity of purpose and effect, binding the obligors to pay all such damages, or costs and damages, as the party enjoined shall sustain in consequence of the injunction, if it shall be dissolved, or if the court shall finally decide that the plaintiff was not entitled to it. When an action accrues, there is a right to damages, first, for costs and expenses incurred in defending against the writ, and in procuring its dissolution; and second, for losses or injuries from its operation in respect to the subject to which it refers.

COSTS AND EXPENSES; ATTORNEY FEES.— In cases where the bond or undertaking embraces the payment of "costs," if the injunction be not sustained, taxable costs are meant, and they are necessarily a part of the damages by the very terms of the contract.¹ But they are a part of the damages, when costs *eo nomine* are not provided for.² Costs paid as a condition for a continuance cannot be recovered as part of the damages.³

¹ Corcoran v. Judson, 24 N. Y. 106; Derby Bank v. Heath, 45 N. H. 524; Troxall v. Haynes, 49 How. Pr. 517; 16 Abb. Pr. N. S. 1; Moore v. Horter, 1 Port. 15.

² Id.; Edwards v. Bodine, 11 Paige, 223; Coates v. Coates, 1 Duer, 664; Aldrich v. Reynolds, 1 Barb. Ch. 613; Andrews v. Glenville Woolen Co. 50 N. Y. 282; Hovey v. Rubber Tip Co. 50 N. Y. 335; S. C. 12 Abb. N. S. 360; Disbrow v. Garcia, 52 N. Y. 654; Rose v. Post, 56 N. Y. 603; 49 How. Pr. 517; Troxall v. Haynes, 16 Abb. N. S. 1; Noble v. Arnold, 23 Ohio St. 264; Strong v. Deforest, 15 Abb. 427; Taacks v. Schmidt, 18 Abb. 307; Weld v. Joel, 15 How. Pr. 320;

S. C. 6 Duer, 671; Behrens v. McKenzie, 23 Iowa, 333; Langworthy v. McKelvey, 25 Iowa, 48; Riddle v. Cheadle, 25 Ohio St. 278; School Directors v. Trustees, 66 Ill. 247; Eldon v. Sabin, 66 Ill. 126; Misner v. Bulard, 43 Ill. 470; Ryan v. Anderson, 24 Ill. 652; McRae v. Brown, 12 La. Ann. 181; Ah Thaie v. Quan Wau, 3 Cal. 216; Wilson v. McEvoy, 25 Cal. 169; Prader v. Grimm, 28 Cal. 11; Prader v. Grimm, 13 Cal. 585; Gear v. Shaw, 1 Pinney (Wis.), 608.

³ Bullock v. Ferguson, 30 Ala. 227. Nor costs on appeal. Woodson v. Johns, 3 Munf. 230; Town of Guilford v. Cornell, 4 Abb. 220.

Where an injunction has been improvidently granted, or obtained without good cause, the defendant should take seasonable steps, probably, to relieve himself from its operation, and thus prevent damages.¹ A party who slept upon his rights and neglected this duty, so that the demand enjoined became barred by the statute of limitations before he finally made a motion which succeeded to dissolve the injunction, was not permitted to recover on the bond for that loss.² It is therefore one of the direct effects of a groundless injunction to necessitate exertion and costs to get rid of it. Accordingly, costs and expenses, reasonable in amount, incurred for the single object of obtaining a discharge of the injunction, are universally allowed as part of the damages on such obligations. The law sanctions a resort to appropriate means, and the employment of counsel is such, for obtaining relief from an injunction; and hence the bond is almost universally construed to include expenses for such service.³

¹ See ante, vol. 1, p. 148; *McDonald v. James*, 47 How. Pr. 474; *Hovey v. Rubber Tip P. Co.* 50 N. Y. 335.

² *Dunn v. Davis*, 37 Ala. 95.

³ See cases in note 1, ante, p. 64.

In *Edwards v. Bodine*, 11 Paige, 223, upon the allowance of an injunction to restrain the defendants from proceeding to sell mortgaged premises, under a decree of foreclosure, the complainant gave a bond with sureties, conditioned to pay to the parties enjoined such damages as they might sustain by reason of the injunction, if the court should eventually decide that the complainants were not equitably entitled to such injunction. The injunction not being sustained, the enjoined party obtained an order referring it to a master to ascertain their damages by reason of the injunction, according to the thirty-first rule of the court of chancery. The master, in addition to loss of interest upon the amount for which the property would have sold, and the taxable costs of the

master who was to have sold the property, and the expenses of advertising, etc., allowed for half commissions on the amount of the decree; \$20 for services of the plaintiff in this suit, and of the solicitor in attending the sale, and employing counsel to get the injunction dissolved, and \$100 for counsel fees upon procuring such dissolution. The vice chancellor disallowed the last three items, and his decision was appealed from, and the chancellor said: "The master properly allowed, as part of the damages sustained by the issuing of the injunction, the fees for services, in relation to the sale, which the master would have to perform the second time, in consequence of the sale being stopped, and also the expense of re-advertising the sale of the mortgaged premises. But the master is not entitled to commissions, except where the property, which he is directed by the decree to sell, is actually sold by him. The vice chancellor has, therefore, properly disallowed the

charge of \$10 for half commissions. So much of the taxable costs of the defendants as was necessary to obtain a dissolution of the injunction, may also be properly considered as damages which they have sustained by reason of the injunction; so as to enable them to recover those costs of the sureties, in the injunction bond, if they are unable to collect them of the complainants in the suit. The language of the condition of the bond, and of the second clause of the thirty-first rule of this court, under which rule the bond in this case was taken, is undoubtedly broad enough to embrace the necessary counsel fees which the defendants have been obliged to pay out in order to procure the dissolution of the injunction. For the necessity of paying such counsel fees is an actual damage which the defendants have sustained by reason of the injunction. . . .

"The rule was intended to protect the defendant against any injury he might sustain by the allowance of an injunction, whether the injunction was erroneously granted by the officer of the court where the case made by the bill did not warrant its being issued, or was properly allowed by the officer, but upon a partial or erroneous statement of the real facts of the case. And the object of the court, in requiring a bond in such cases, will be best effected by giving to the language of the condition its natural sense; which will cover the necessary costs and counsel fees to obtain a dissolution of the injunction, as well as the damages which the party enjoined has otherwise sustained during the time the injunction was in force. If it was a mere matter of discretion, I might not be disposed to allow the counsel fees as damages in the pres-

ent case; although the evidence before the master showed, without contradiction, that the amount paid was reasonable, and that the payment was necessary to obtain a dissolution of the injunction. But as they are clearly covered by the condition of the bond, I cannot disallow them without depriving the appellant of a legal right; the object of the reference to the master being merely to ascertain the extent of the damage sustained, according to such condition. The decretal order of the vice chancellor upon the exceptions must, therefore, be so far modified as to allow the \$100 charged for the extra fees to the two counsel, employed to argue the case upon the motion for a dissolution of the injunction. The other charges, for personal services, etc., of the parties in attending the sale, and going to see and consult with counsel, and the charge of the solicitor for attending to advise them at the sale of the property, are not damages recoverable under the condition of the bond, and must be disallowed." *Baggett v. Beard*, 43 Miss. 120; *Brown v. Jones*, 5 Nev. 374; *Raupman v. Evansville*, 44 Ind. 392; *Campbell v. Metcalf*, 1 Mont. T. 379; *State v. Thatcher*, 56 Ill. 257; *Tamaroa v. Southern Ill. University*, 54 Ill. 334; *Willett v. Scoville*, 4 Abb. 415; *Fitzpatrick v. Flagg*, 12 Abb. 189. See *Wallace v. Dilley*, 7 Md. 237.

In *Aldrich v. Reynolds*, 1 Barb. Ch. 613, a mortgage foreclosure by advertisement was enjoined; and on a dissolution of the injunction there was a reference to ascertain the amount of damages sustained by the defendant by reason of the injunction. The defendant held a bond and mortgage upon a farm in the possession of the complainant, and

advertised a sale to take place on the 5th of June, 1845. It appeared on the reference, that on the 5th of June the crops and grass upon the premises, and which were afterwards taken off by the complainant during the continuance of the injunction, were worth \$90.30, exclusive of the labor and expense of protecting, gathering and securing them. There was a deficiency of \$100 when the sale took place soon after the dissolution of the injunction. The master allowed, as part of the damages, \$90.30, the value of the crop and grass taken from the premises by the complainant during the time the sale was stayed. He also allowed the interest upon the amount due from the 5th of June until the injunction was dissolved, and the extra expense of continuing the notice of sale during the time the sale was suspended by the injunction. The taxable costs of the defendant in obtaining a dissolution of the injunction, and upon the reference, as well as \$25 which had been paid by the defendant as an extra counsel fee in obtaining such dissolution.

The chancellor held that the crops growing upon the mortgaged premises would have gone to the purchaser if a sale had been made on the 5th of June, and therefore a sale at that time would have brought \$90.30 more than after the crops had been removed, and hence would have produced just about the amount of the mortgage, with the interest and costs of foreclosure. "The defendant, therefore, lost not only the difference between what the lot would have brought in June, and that for which it was actually sold after the injunction had enabled the mortgagor to strip it of its crops and grass, but also the interest on the amount which he would have

been entitled to receive if the sale had taken place on the 5th of June." The report of the referee was affirmed.

A notable exception to the general current of decisions on this subject is the case of *Oelrichs v. Spain*, 15 Wall. 211. The bond was required to contain a condition "to pay the defendants such costs and damages as they may respectively sustain," and the bond executed substantially conformed to the order. The case was heard on the merits "four years, eight months and sixteen days after the injunction issued"—as the reporter very precisely mentions,—and the decree dissolved the injunction.

Swayne, J., delivered the opinion of the court: "Upon looking into the report, we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as part of the damages covered by the bonds. . . . The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to (*Day v. Woodworth*, 13 How. 370), and we think is substantially determined by that adjudication. In debt, covenant and assumpsit, damages are recovered; but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendants, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than

Nor is the amount recoverable limited to rates at which the same would be taxed for as costs.¹

The authorities are not agreed on the point whether the party seeking to recover for attorney's fees and expenses must have actually paid them, or may recover where he has simply become liable.² But on principle, and according to the general course of decision in analogous cases, the expenses incurred, and for which the plaintiff is liable, should be included.³ Where, however, the attorney's fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only incidental to that result, such fees and expenses are not damages sustained by reason of the injunction.⁴ The reason is obvious; expenses for another purpose, and which would have to be incurred whether a preliminary injunction had been granted or not, cannot be set down to the account of the injunction. But where no other relief is asked for but an injunction, the expenses to get rid of it on a final hearing, as well as on motion, may be recovered.⁵ In such a case the party enjoined recovered also the expenses of an unsuccessful motion to dissolve; and on this point Rapello, J., said: "It (that motion) was not denied on the merits, nor for any irregularity in making the motion, but because the court, in its discretion, thought it more advisable to defer the inquiry into the merits until the final hearing. It was proper that the defendant should move,

others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests upon a solid foundation, and that the opposite

rule is forbidden by the analogies of the law, and sound public policy."

¹ *Wilde v. Joel*, 6 Duer, 671.

² *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11; *Prader v. Grimm*, 13 Cal. 585; *McRae v. Brown*, 12 La. Ann. 181; *Mills v. Jones*, 9 La. Ann. 11; *Wild v. Joel*, 6 Duer, 671.

³ See ante, p. 142.

⁴ *Noble v. Arnold*, 23 Ohio St. 264; *Hovey v. Rubber Tip Co.* 50 N. Y. 335; *Disbrow v. Garcia*, 52 N. Y. 654; *Langworthy v. McKelvey*, 25 Iowa, 48; *McDonald v. James*, 47 How. Pr. 474.

⁵ *Andrews v. Glenville Woolen Co.* 52 N. Y. 282.

at the earliest opportunity, to dissolve the injunction. His motion did not fail through any fault on his part, or any defect in the merits of his case. The court simply deferred its decision upon the merits until the trial. The result, which, for the purposes of this application, may be assumed to be correct, shows that if the decision had not been thus deferred, the motion should have been granted when made." These expenses were allowed under these exceptional circumstances; for, as Church, C. J., remarked in a subsequent case,¹ "a motion had been made to dissolve the injunction, which was denied upon the ground that, as the motion involved the whole merits of the action, which was brought to secure a permanent injunction, it was more appropriate that it should be determined upon a trial. The defendant was therefore compelled to go to trial to secure a decision that the party was not entitled to the injunction, in order to recover the damages which he had sustained in endeavoring to procure a dissolution."² Generally the costs and expenses of an unsuccessful application to dissolve will not be allowed, though the motion is regular, and the court in its discretion continues the injunction to the final hearing, and then dissolves it on the merits.³ Not only are the costs and expenses incurred directly to obtain dissolution of the injunction allowed as damages, but also those which are incident to executing the references that courts of equity, in many jurisdictions direct under local statutes or rules of practice, to ascertain the damages sustained by the enjoined party in consequence of the injunction.⁴

DAMAGES FROM THE RESTRAINT OF THE INJUNCTION.—The damages which the enjoined party may be entitled to for losses and injuries sustained by the operation of the writ are as various as the subjects which may be affected by such restraint. These damages, however, are ascertained and measured by the principle of giving just and adequate compensation for actual

¹ *Hovey v. Rubber Tip Co.* 50 N. Y. 335.

³ *Allen v. Brown*, 5 Lans. 511.

² See comments on the same case in *Troxall v. Haynes*, 16 Abb. N. S. 1; *Langworthy v. McKelvey*, 25 Iowa, 48.

⁴ *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Rose v. Post*, 56 N. Y. 603; *Ryan v. Anderson*, 24 Ill. 652.

loss, which is the natural and proximate result of the injunction.¹ If the restraint keeps the owner of property out of possession, or deprives him of its use, the compensation is given upon the same principle as in other cases of wrongful deprivation. Where a party was prevented from enjoying the benefit of his real estate by injunction which was obtained without cause, the value of the use and occupation was given as damages.² But an injunction interfering with the collection of rents due does not change the legal relation of landlord and tenant, so as to entitle the former to recover for use and occupation; but the true basis of recovery is the losses from the insolvency of the tenants during the pendency of the injunction. In a case where a landlord was restrained from interfering with the possession of real estate occupied by tenants, it was held that the inquiry of damages should be, what rent has the defendant lost by reason of the injunction. If the tenants were and are still responsible, then their covenant can be enforced and the rent recovered; and there would be no actual loss. If, however, they have become irresponsible, or have abandoned the premises pending the injunction, or the premises, or any part of them, were unoccupied and might have been rented, there may be a claim for a loss of rent. In short, the loss must be ascertained in view of the responsibility of the parties and their several remedies; and also in view of the condition of the premises and the landlord's ability to have rented or collected rent while the injunction continued, which he is unable now to collect, by reason of the irresponsibility of the tenants, or by reason of the premises being unoccupied; for such items the defendants should recover, as the legitimate damages sustained by reason of the injunction.

If the plaintiff, pending the action, collected any rent of the tenants, the amount so collected will form part of the damages.³ Where the injunction prevented the owner from clearing

¹ Bullock v. Ferguson, 30 Ala. 227; Collins v. Sinclair, 51 Ill. 328; Hale v. Meegan, 39 Mo. 272; Brown v. Tyler, 34 Tex. 168; Moulton v. Richardson, 49 N. H. 75; Hurd v. Trimble, 1 Litt. 413.

² Rutherford v. Mason, 24 Ind. 311;

Fleming v. Bailey, 44 Miss. 132. See Sturges v. Knapp, 36 Vt. 439, where damages were assessed and distributed upon peculiar facts.

³ McDonald v. James, 47 How. Pr. 474.

away certain timber upon agricultural lands, the damages for the delay were held too remote and consequential.¹ A party so prevented from working on a lead mine, and thereby kept out of employment, was treated as having a just demand for damages on the basis of a loss of time to be compensated at the usual rate of wages.² But in Nevada, it was held that where an injunction was obtained to restrain a party from cutting and drawing wood, neither the loss occasioned by reason of his cattle or wagon being thrown out of employment, the expense of making a road, which became useless, nor the injury to his credit, could be taken into consideration.³

If an owner is thus deprived of his personal property, he is *prima facie* entitled to recover the value; and this measure of redress has been allowed where the party obtaining the writ, during its pendency, took possession of the property, destroyed its identity, and converted it to his own use.⁴ It may admit of some doubt whether the loss of the property in such a case proceeds from the injunction. The writ stayed the defendant, but it vested no possession or right of control in the plaintiff.⁵ His

¹ McKenzie v. Mathews, 59 Mo. 99.

² Muller v. Fern, 35 Iowa, 420.

³ Brown v. Jones, 5 Nev. 374. In another case, Gear v. Shaw, 1 Pin. (Wis.) 608, an injunction was granted to restrain parties from mining on a certain lot; some time after dissolution of the injunction, a new mineral discovery was made on the lot, and a large quantity of mineral raised from it. In assessing damages on the injunction bond, it was *held* that proof that the use of the money for which the mineral might have been sold was worth more than the legal rate of interest for the purpose of enhancing damages should be rejected as ideal and speculative; and so, too, the proof of such subsequent discovery for the purpose of showing what the enjoined parties in the absence of the injunction might have realized.

Where the building of a private

road was enjoined, and, after dissolution, the work was prosecuted, it was held that, had the road been finished after the removal of the injunction, at an increased cost, such additional expense would have been a proper subject of damages. Morgan v. Negley, 53 Pa. St. 153.

⁴ Barton v. Fish, 30 N. Y. 166.

⁵ In Patterson v. Kingsland, 8 Blatchf. 278, P, a mortgagee of real estate, sued K to recover damages for the removal from the mortgaged premises of a building which K had erected thereon under an agreement with the owner, and had removed therefrom, after the execution of the mortgage. When K had removed the building to some distance, P obtained an injunction restraining the further removal. The building was subsequently blown down by the wind. It was held that P did not, by obtaining such injunc-

seizure of the property was an independent tort, and not the natural and proximate consequence of the injunction, except as the restraint prevented the owner from protecting it.¹ But it must be confessed that the ground of liability on the bond is stated with force and plausibility by Denio, C. J.: "This seems to me a very plain case. The plaintiff claiming to be the owner of personal property lying on the defendants' land, sued the defendants, who also claimed to own that personal property, to establish his title; and he procured a preliminary injunction, forbidding the defendants from asserting their alleged ownership by suit in court, or in any other way, pending the principal suit; but he was finally beaten, the court determining that the property belonged to the defendants, and not to the plaintiff. In the meantime, while the defendants' hands were tied, the plaintiff carried off the property, destroyed its identity, and disposed of and converted its proceeds to his own use; and the question is, what damages the defendants have suffered in consequence of this proceeding of the plaintiff. The object, and the effect of the injunction, manifestly was to allow the plaintiff to carry off and dispose of the property, while the defendants, who were, as the event has shown, its owners, were precluded from doing anything whatever, in court or out of court, to protect themselves in its possession. *Prima facie*, the value of the property which the defendants have lost was the measure of the defendants' damages. If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendants' reach, the damages probably would have been such as resulted from their being deprived of its use, *pendente lite*, and from any depreciation in value. But under the existing facts, it is the same thing as though it had been destroyed, while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is, that the loss was not occasioned by the injunction, but by the tortious act of the plaintiff and his assistant, unconnected with that process. This is too narrow a view of the question.

tion, take control of the building so that he could be charged with the value where it then stood; nor was the obligation imposed on him to

assume possession and replace it on the land.

¹See *Ashley v. Harrison*, 1 Esp. 48; *Vickers v. Wilcocks*, 8 East, 1.

If it had been carried off and converted by a stranger while the owners were prohibited from doing anything to protect it, the person who restrained them ought to make recompense for the loss. *A fortiori*, he should make compensation when he himself carried it off and converted it during the restraint which he had procured to be imposed. The efficient cause of the loss was the inability of the defendants, caused by the injunction, to take care of and preserve that which was their own." It was said in another case, in New York, where a lessor had been enjoined from collecting rents, that if the plaintiff, pending the action, collected rent of the tenants, the amount so collected would form part of the damages.¹ And damages were given in an Illinois case on the same principle.² A lessee of farming lands sued out an injunction against a prior lessee to prevent him from harvesting a crop of rye which he had sown while in possession under a lease requiring him to give one-third of the crop as rent; the plaintiff harvested the rye himself; and the court, at the hearing, having found that two-thirds of the rye belonged to the defendant, dissolved the injunction and assessed as damages the value of the two-thirds, after deducting the expense of harvesting the whole crop.

Where the writ operates not to change the possession, and does not result in a loss of the chattels, but in suspending the owner's control, then the amount properly recoverable on the bond is the loss in the value during the operation of the injunction, not exceeding the penalty, with interest from the institution of the suit.³ And this damage is the difference between the value of the property at the time when the bond was given, and its value at the time the injunction was dissolved, together with interest.⁴

The injunction may prejudice a creditor by hindering and delaying the prosecution of suits until the debtor becomes insolvent; and by the loss or depreciation of property on which his debt is secured, by delaying the sale of it, and also by increas-

¹ McDonald v. James, 47 How. Pr. 474.

² Collins v. Sinclair, 51 Ill. 328.

³ Levy v. Taylor, 24 Md. 282; Meyenburg v. Schlieper, 48 Mo. 426-440.

⁴ Brandamour v. Trent, 45 Ill. 372; Ruben v. Stephan, 25 Miss. 253; Levy v. Taylor, 24 Md. 282.

ing costs and expenses. Such losses are covered by the injunction bond.

In one case the principal defendant had filed his bill in equity and obtained a temporary injunction to stay the plaintiff's action at law against him. He failed to maintain his bill, and thereby became liable on his bond. The reasonable damages which the party enjoined was held entitled to recover were the legal taxable costs both in the suit at law and on the bill in equity during the time he was delayed by the injunction, provided he had not or could not realize the same on the original proceedings against such principal defendant; also, his reasonable counsel fees for which he was liable to pay in both of the original cases for the same time. He should not recover as damages under his bond, the interest accruing on the original note in the suit at law, unless it appeared that the debtor had become insolvent since the injunction, or that the creditor had suffered some damage equal to such interest without fault.¹

¹Derby v. Heath, 45 N. H. 524; Redderburger v. McDaniel, 38 Mo. 138; Tryon v. Robinson, 10 Rich. L. 160; Willett v. Scovill, 4 Abb. 405; Edwards v. Pope, 4 Ill. 465; Aldrich v. Reynolds, 1 Barb. Ch. 613; Kennedy v. Hammond, 16 Mo. 341. A conveyed to B a mill and leasehold to secure C the payment of two notes. After the first and before the second note matured, the property was advertised and sold pursuant to the deed of trust, and D became the purchaser. After the sale D tendered to B the amount of the note which had matured, and produced the receipt of the assignees of the grantor for the balance of his bid and demanded a deed. B refused to deliver a deed, and when the second note became due, again advertised the property for sale. D applied for and obtained an injunction. When the injunction was dissolved, the lease had been declared forfeited and the mill had burned down, so that the mortgaged inter-

est would not have sold for enough to defray the expenses of a sale. Held, upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes, with interest, etc., even though the makers of the notes were solvent.

A statute of Missouri required an injunction bond "to secure the amount, or other matter to be enjoined, and all damages that may be occasioned by such injunction, conditioned that the complainant shall abide the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him, if the injunction shall be dissolved." Another provision was that, "if money shall be enjoined, the damages thereon shall not exceed ten per cent. on the amount released by the dissolution, exclusive of legal interest and costs."

The rule of ten per cent. held not to apply. Ryland, J., said: "Here,

the complainant did not seek to enjoin and restrain the defendants from the collection of a judgment or of a sum of money, but to prevent them from proceeding to sell property, the trust fund; and by that act, on the part of the complainant, serious injury may have been committed; no less than the destruction, in a greater or less degree, of the value of the entire fund; and can it be said that ten per cent. is to be the amount of damages to be awarded, on the dissolution of the injunction in such cases? Ten per cent. on what? The original debt, for the payment of which the trust deed was made? That will not do. Nor can the defendants be compelled to resort to the bond on which that injunction was originally allowed. The condition of the bond is, 'pay all sums of money, damages and costs that shall be adjudged against him, if the injunction shall be dissolved.' Now, before suing on this bond, after dissolution, the damages must be adjudged, and the non-payment of the amount adjudged forms the breach of the bond so far as damages are concerned. . . .

"At the maturity of the second note, steps were taken to sell the trust property; then the complainant steps in and by his bill prevents the sale by injunction. Upon the dissolution of this injunction, the trust property being destroyed partly by fire, and the lease forfeited to the original lessor: the trust property, I may say, lost to the *cestui que trust*; the damages, in consequence, were assessed at the amount of the debt secured and interest, and I think very properly. 'Let us look at the facts in this case. Hall, Allen & Childs were the proprietors of the lease from Chamber

of the steam saw mill. They gave their deed of trust on the property to secure two notes. Afterwards, Hall sold all his interest in the premises to Childs & Emerson, expressly subject to the debt mentioned in the trust deed. Then Allen sells his interest in the property to Childs & Emerson, in like manner subject to the payment of the debt. Then Childs transfers the property to Emerson subject to the payment of the debt. Lastly, Emerson transfers the property to John Maguire, in the same manner subject to the debt; so that Maguire becomes the owner of the property, and, in respect to the prior parties, is the principal debtor, and they merely his securities to the holder of the trust debt. Maguire procures Kennedy to bid off the property at the trustee's sale, and prosecutes the present suit for his own benefit, using Kennedy's name. Maguire has all along been in possession, receiving a large rent, \$2,000 per year, until the mill was burned down in 1849. The deed of trust contained a stipulation that the premises should be insured, and that the insurance should stand as security to the creditor. Maguire collects the insurance for his own benefit. This, too, pending the injunction. So, too, pending the injunction, the landlord enters into the premises for a forfeiture, and Maguire suffers him to keep possession, and to make leases to other parties. Maguire, after making the trust debt his own, appropriates the security for the debt to his own use; and insists that the original Orris Hall shall look to the makers of the notes individually, and not to the trust fund.

"The notes are still due; the trust property was sold; Maguire gets possession through Kennedy's pur-

chase, pays no part of the debt for which the property was sold, rents out this very trust property for \$2,000 a year, and indemnifies Kennedy to prosecute this proceeding, in which the injunction was obtained.

"Had the second sale proceeded, the debt in all probability might have long ago been made out of the trust property. Pending this proceeding, that property has become lost to the *cestui que trust*; and because the original makers of the notes are supposed to be worth \$3,000, Maguire contends that the *cestui que trust* has not been damaged, and that he must look to the notes."

The case of *Yates v. Joyce*, 11 John. 136, was held in the foregoing case not to have any or but slight application to any principle involved in the case under consideration. That was a suit by a judgment creditor, whose judgment was a lien on land, against a party who pulled down erections which were on the land. The court sustained the action on the principle that, "where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages for the same."

In *Lane v. Hitchcock*, 14 John. 213, the court say: "This case is supposed to be within the principles of *Yates v. Joyce*, 11 John. 136. In the case now before us, proof was offered on the trial that the mortgagor was insolvent, and had no other property than the mortgaged premises, out of which the debt of the plaintiff might be satisfied; but there was no averment in the declaration to warrant such proof. These were material and indispensable facts in order to give the

plaintiff a right of action; and to allow this proof without the averment, would take the defendant by surprise."

In *City of St. Louis v. Alexander*, 23 Mo. 484, an injunction was obtained by stockholders to restrain a sale, under a trust deed, of property, franchises, etc., belonging to the corporation. A statute provided that upon dissolution of an injunction in whole or in part, damages should be assessed by a jury, or, if neither party require a jury, by the court; but if money shall have been enjoined, the damages thereon shall not exceed ten per centum on the amount released by the dissolution, exclusive of legal interest and costs. The court say: "The injunction to stop the proceedings of a trustee to sell property, under a deed of trust to pay a debt, has not been considered such an injunction upon money as to authorize the assessment by the rule of per cent. laid down in that act alone. In the case of *Kennedy's Ex'r v. Hammond*, 16 Mo. 341, the court held that the damages in such a case were not limited to ten per cent. on the debt, but might extend to the full amount of the debt, if the loss to the creditor by the injunction extended so far. The meaning of the words, 'if money shall have been enjoined,' has been generally supposed to embrace injunctions upon the executions of judgments originated by the debtor therein against his creditor, and not such as restrain other acts whereby money may in consequence thereof be deferred in payment by the interposition of third parties. Upon an execution against a debtor's estate, the payment of which can be enforced out of all his property, and the justice of which has been settled by the law through the intervention

WHAT FACTS NO DEFENSE.—Want of jurisdiction in the court over the subject matter of the action does not deprive the defendant of the right to damages on the undertaking.¹ Nor will disobeying the writ defeat an action on the bond.²

Where all damages covered by the bond, or recoverable, must be ascertained in the injunction suit,³ and, *a fortiori*, if the bond is conditioned to pay such damages as shall be so ascertained, the sureties are bound by the action of the court in the ascertainment of the damages, and can raise no question as to its correctness in an action on the bond.⁴

of its officers and tribunals; if there be an interference by injunction, and it turn out to be without proper cause, and is therefore removed, then damages not exceeding ten per cent. upon the amount released from the injunction may be a just penalty for improperly interfering; and a just recompense for the delay which such interference produced to the creditor. But such is not the case when a sale of trust property has been enjoined. Here the debt has been recognized by the parties only; the law has not adjudicated upon it. Then, when a sale is enjoined by a third party, and the court, after a hearing, dissolves the injunction, it becomes proper to ascertain the damages, not by the rule of per cent., but from the injury the creditor has sustained from the improper act of the party stepping in between the creditor and the debtor, and hindering and delaying the execution of the means provided to enforce payment. Suppose, in this case, that the trust property was not worth half the debt intended to be secured; would the delay in the sale of it, caused by injunction, authorize the court to give ten per cent. damages for the detention and non-payment of the whole debt? What injury

has the creditor sustained by enjoining the sale of property not worth one-tenth of his debt? Again, suppose the injunction had caused the loss of the entire fund in trust; would ten per cent. on the debt be a proper amount of damages—the only amount which the law would recognize, although there be proof amply to show that the fund was in value equal to the debt? No. In all such cases, the court, or jury, should determine the amount of injury by evidence before it or them as to the damages sustained; the probable amount that would have been realized; the value of money at the time, and other circumstances, tending to show the damages sustained by the creditor in consequence of the injunction.”

¹ Cumberland Coal Co. v. Hoffman Coal Co. 15 Abb. 78; Hanna v. McKenzie, 5 B. Mon. 314.

² Colcord v. Sylvester, 66 Ill. 540.

³ Roberts v. Fah, 36 Ill. 268; Methodist Church v. Barker, 18 N. Y. 463; Blakeney v. Ferguson, 18 Ark. 347.

⁴ Lothrop v. Southworth, 5 Mich. 436; Anderson v. Falconer, 30 Miss. 145; Lockwood v. Safford, 1 Ga. 72.

WHAT MAY BE SHOWN IN DEFENSE.—Where an injunction is rightfully awarded, but afterwards properly dissolved, upon matters done or arising afterwards, no damages can be recovered.¹ So the sureties in a bond, given on granting a temporary injunction, are not liable for damages accruing after the injunction has been made perpetual, although that decree has been reversed.² And if the injunction be dissolved before the merits are adjudicated, the obligors may show the facts that would entitle the plaintiff in the injunction suit to the writ in mitigation.³ So where the injunction had been granted to stay a sale under execution, the subsequent reversal of the judgment on which the execution issued may be taken into consideration, on the question of damages, in an action on the injunction bond.⁴

The damages and expenses incurred by the real party in interest, in procuring a dissolution, will be presumed in law to have been incurred by the defendant on the record, and may be recovered in his name for the person beneficially interested.⁵

¹Taylor v. Bush, 5 B. Mon. 84; Massie v. Sebastian, 4 Bibb, 437; Anderson v. Wallace, 6 T. B. Mon. 381; Lampton v. Usher's Heirs, 7 B. Mon. 57, 66.

²Weber v. Wilcox, 45 Cal. 301.

³Stewart v. Miller, 1 Mont. 301.

⁴Fah v. Roberts, 54 Ill. 192. In Mohan v. Tydings, 10 B. Mon. 351, it was held that in an injunction suit brought by executors in their representative character, the bond given by such executors and their sureties, only binds them to the extent of assets. See Mills v. Forbes, 12 How. Pr. 466.

⁵Andrews v. Grenville & Co. 50 N. Y. 282; Hovey v. Rubber Tip P. Co. 50 N. Y. 335. In Pearce v. Athey, 4 W. Va. 22, where an injunction bond was joint as to the obligees, and joint and several as to the obligors, it was held that a joint action might

be brought by the obligees and a joint judgment rendered for the whole of their demand, although the claims due them respectively might be of different amounts, and bear interest from different dates. But in Fowler v. Frisbee, 37 Cal. 34, where several parties were severally in possession of and cultivating in separate parcels a tract of land, and were sued jointly in ejectment to recover possession of the whole tract, and an injunction was obtained restraining them jointly from taking off the crops, it was held that such parties could not maintain a joint action for damages on the injunction bond, where the damages were not joint. See Lully v. Wise, 28 Cal. 539; Browner v. Davis, 15 Cal. 9; Summers v. Farish, 10 Cal. 347.

SECTION 8.

APPEAL AND SUPERSEDEAS BONDS.

The conditions of these bonds—Supersedeas bonds for review in supreme court of the United States—Liability where the judgment below is not wholly personal, or is secured—Instances of more specific conditions—Interest and damages awarded on appeal.

THE CONDITION OF THESE BONDS.—There is considerable diversity in the conditions of these bonds and undertakings, by the legislation of the different states; but in certain particulars there is extensively a substantial agreement. Under the practice which preceded the code, and in the federal courts, bonds on appeals and writs of error, which operate as a *supersedeas*, contain generally the condition to prosecute the appeal or writ of error to effect; and if the judgment be affirmed in whole or in part, or the plaintiff in error or appellant fail to make his plea good, he shall answer all damages and costs.

A supersedeas bond, with such a condition, is strikingly analogous to the bond given by the plaintiff in the action of replevin. In that action, the plaintiff obtains possession of the property in question by giving a bond conditioned to prosecute the suit to effect; and when he fails in the performance of the condition, he and his sureties are liable on the bond for the value of the property, unless it is returned, and interest. So, by executing the supersedeas bond, a party against whom a money judgment or decree has been rendered, and who appeals or takes a writ of error, retains possession and enjoyment of the money in question, subject to the same condition. On the breach of that condition, there is a forfeiture of the bond, and the obligee is entitled to compensation, within the penalty, to the amount of the moneys so withheld and interest. In other words, the surety undertakes to pay the judgment, if the condition of the bond is not fulfilled.¹

SUPERSEDEAS BONDS FOR REVIEW IN SUPREME COURT OF THE UNITED STATES.—By the 22d section of the judiciary act of

¹ *Graham v. Swigert*, 12 B. Mon. 522; *Ives v. The Merchants' Bank*, 12 How. U. S. 159; *Sessions v. Pontard*, 18 How. U. S. 106; *Talbot v. Morton*, 5 Litt. 326; *Many v. Sizer*, 6 Gray, 141.

1789, the judge signing the citation is required to take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs, if he fail to make his plea good.¹ And since 1803, when provision for appeals in equity and admiralty cases was made, supersedeas bonds in such cases have been subject to the same condition. And the 29th rule of the supreme court of the United States, adopted in 1867, in accordance with the prior adjudications of the court, provided that supersedeas bonds in the circuit courts "must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his appeal or writ to effect, and answer all damages and costs if he fail to make his plea good." And this rule declared that "such indemnity, where the judgment or decree is for the recovery of money, not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay,' and costs and interest on the appeal." Under this rule the penalty of the bond would be ample for as large a recovery against the surety by action on the bond, as the remedy by execution against the principal.²

It is said in one case, that "it is not required that the security shall be in any fixed proportion to the decree. What is necessary is that it be sufficient."³ In that case, the decree below was for over three hundred thousand dollars; and a bond had been required for double that amount. On a motion in the appellate court to reduce it, the court, after making the remark which has been quoted, said: "We are satisfied that a bond in a much less amount will be entirely sufficient; and inasmuch as it appears that security in part for the amount they might be decreed to pay, had been given by the present appellants, before the bond on appeal was required, by a deposit of bonds of the United States, and other private bonds, amounting in all to a sum not less than \$200,000, we will order that the appellants have leave to withdraw the appeal bond now on file, on filing

¹ R. S. § 1000.

² See *Cattell v. Brodie*, 9 Wheat. 553; *Stafford v. Union Bank*, 16 How. U. S. 135; *S. C.* 17 How. U. S. 175; *Rubber Co. v. Goodyear*, 6

Wall. 153; *French v. Shoemaker*, 12 Wall. 86; *George v. Bischoff*, 68 Ill. 236. See *Roberts v. Cooper*, 19 How. U. S. 373.

³ *Rubber Co. v. Goodyear*, *supra*.

a bond in lieu thereof in the sum of \$225,000, with good and sufficient sureties." It will be observed that though the judgment was a money judgment, and rendered against the defendants personally, the court fixed the penalty at a less sum, in consideration of there being other security. Hence there could not, for that reason, be a recovery against the sureties for the full sum of the judgment. It was not deemed necessary; but on affirmance of the judgment the bond would be available to the extent of the penalty, unless the judgment had been so far otherwise satisfied, that a sum less than the penalty would completely discharge it. In an earlier case not unlike it, in the fact of a personal judgment and collateral security, the court say: "The condition of the bond was 'for the prosecution of said appeal to effect, and to answer all damages and costs, if' there should be a failure to make the plea good in the supreme court. There was a failure to do this, and the penalty of the bond was incurred. Whatever hardship there may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree, the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed *pro rata* between them. (The appellee . . .) has a claim on both funds; first on the proceeds of the land, and second, on the judgment entered on the appeal bond for the satisfaction of the original decree."¹

THE LIABILITY WHERE THE JUDGMENT OR DECREE BELOW IS ONLY IN PART FOR MONEY, OR IN REM.—It is undoubtedly true that the supersedeas bond secures the amount of the judgment or decree rendered against the appellant or plaintiff in error personally, to the extent of the penalty, even though there be other security. This is apparent from the authorities cited in the preceding notes. The sureties may be resorted to in the

¹Sessions v. Pintard, 18 How. U. S. 106. The judgment was rendered on the bond for the full amount of the penalty before sale of the land which was security. The proceeds were applied to the original

decree, and after such application there was less due than the amount of the judgment on the bond. The latter was reduced accordingly by a receipt, and direction to collect on the execution only the balance.

first instance; because an action accrues against them on the forfeiture of the bond, and the value of the other security is no more to be considered in reduction of the amount to be recovered than the responsibility of a solvent principal.¹ Rule twenty-nine of the supreme court, which has been referred to, formulates the law as generally held in other cases: "In all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in a case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay and costs and interest on the appeal."

In a case decided prior to the adoption of this rule, a bond had been given in a penalty of \$25,000 upon appeal from a decree in admiralty rendered for \$22,224; the decree had been affirmed with six per cent. damages, as well as costs. On return of the mandate, judgment had been entered for the original amount, and also for \$6,078.20 damages arising by reason of the appeal, and for \$529.98 costs. An amount about equal to eighty per cent. of the total sum for which execution was issued, had been realized by sale of property attached when the proceeding was commenced, and on which a lien continued until sold. The deficiency exceeded the penalty of the supersedeas bond; and it was contended in behalf of the sureties, that the proceeds of the sale should be applied ratably to every part of the demand, and would thus reduce the damages and costs to about \$1,200. This view, however, was rejected by the court. It was held that the surety was bound to pay such damages as might be awarded by the supreme court, and costs; and he could have been sued, and judgment had against him, had no execution issued. He was positively bound to the amount of his bond, and could not be heard to allege an extinguishment of it in part, because of a payment made by his principals, leaving an amount due equal

¹Sessions v. Pintard, 18 How. U. S. 106.

to the bond. Mr. Justice Catron said: "This is the plain equity of the case. If the appeal had not been taken, and the property attached had been sold in due time after the first decree for \$25,000, no damages would have been sustained by the plaintiffs below; and as the surety was instrumental in delaying satisfaction, it is equitable that he should respond to such damage as his act occasioned, and which enlarged the amount."¹

The judgment in the appellate court for damages necessarily ascertains the amount that the respondent is entitled to recover when he realizes the entire amount recovered. If, by reason of the appeal, the original judgment is wholly or partially lost, that is an additional damage covered by the supersedeas bond, if the penalty is large enough. The bond is not for the damages awarded by the appellate court simply, but "all damages;" and hence, when a judgment or decree is for the recovery of money not otherwise secured, the bond is required to be made an indemnity for the whole amount of the judgment, including just damages for the delay, and costs and interest on the appeal.

Where an intruder, ousted by judgment, in quo warranto, from an office having a fixed salary and of personal confidence, as distinguished from one merely ministerial, takes a writ of error, and, by a supersedeas bond, keeps himself in the office and in the enjoyment of the salary pending the writ, which he fails to prosecute successfully; in an action on the bond by the party who has the judgment of ouster, the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and the consequent operation of the supersedeas.²

In a Kentucky case, action was brought on a supersedeas bond executed to stay execution pending a writ of error from the

¹ *Ives v. The Merchants' Bank*, 12 How. (U. S.) 159; *Sessions v. Pintard*, 18 How. (U. S.) 106.

² *U. S. v. Addison*, 6 Wall. 291. It was also held in this case that the rule which measures damages upon breach of a contract for wages, or for freight, or for the loss of the rent of buildings, where the party aggrieved must seek other employment, or

other articles for carriage, or other tenants, and where the damages he is entitled to recover is the difference between the amount stipulated and the amount actually received, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical. See *Lawler v. Alton*, 8 Irish L. 160.

supreme court of the United States, under the twenty-fifth section of the judiciary act, the decree being otherwise secured. The condition of the bond was to prosecute the writ to effect, or on failure thereof, to pay the amount of the original decree, with the damages and costs, and all damages, interest and costs that might be awarded in the appellate court. The condition, in terms, was broad enough to secure the payment of the amount of the decree, but the legal effect was discussed with reference to the condition which the law prescribed, and that was the same, substantially, as required by the laws of that state in case of appeals from judgments and decrees. Mr. Chief Justice Simpson, in delivering the opinion of the court, said: "If it were substantially a decree against the defendants for money, then there can be no question that the law required them, in case they appealed, or suspended its execution by the supersedeas, to secure to the plaintiff the payment of the amount, and the bond imposes a liability to that extent upon the obligors." The court found the decree to be such, and the plaintiff entitled to full recovery against the sureties.¹

¹ *Graham v. Swigert*, 12 B. Mon. 522. Some further observations of the chief justice will not be without value. He said: "The condition of the bond required by the act of congress is substantially the same as is required by the laws of this state in the case of appeals from judgments and decrees. It is, therefore, contended that the decisions of the court upon the effect of such bonds must determine the extent of the obligation of the surety in this case; and that, according to the principles of these decisions, he is not liable to the amount of the decree. . . . The cases referred to for the purpose of sustaining this proposition are *Talbot v. Morton*, 5 Litt. Rep. 326, and *Sumrall v. Reid*, 2 Dana, 65. In both of these cases an appeal was taken from a decree to foreclose a mortgage on real property, and subject it to sale for the payment of

judgments at law. In the first it was held that the bond was sufficient, although it did not secure the payment of the judgment at law, as the decree was rendered against the mortgaged estate, and there was no decree for money. And the court in that case said, it cannot be contemplated by law, that the bond should secure the real estate or its value, or that accidents of fire and destruction of the estate are to be provided for in the bond. In the case of *Sumrall v. Reid*, the appeal bond was conditioned to pay the amount recovered by the decree and costs; and it was decided that there was nothing recovered by the decree, and it only subjected the real estate in the mortgage to the payment of a judgment at law; there was no liability on the surety for the debt.

"The principle attempted to be

deduced from these cases is, that the law prescribes one uniform condition to such bonds, but discriminates between the liability imposed by a breach of the condition, in the different classes of cases. In appeals from a judgment or decree *in personam*, the liability extends so far as to secure the judgment or decree; but in appeals from a decree *in rem*, the demand asserted in the suit, and to obtain the payment of which the proceeding is instituted, is not secured by the bond.

"These cases have not settled the doctrine in the manner and to the extent contended for. They only decide that in cases where there is a mere decree of foreclosure, made for the purpose of subjecting real estate to the payment of judgment at law, and an appeal is taken, the bond required by law does not secure the amount of the demand for the payment of which the land is decreed to be sold. This, according to the reasoning of the court in the first case, results, in some measure, from the nature of the property which is looked to for the security of the debt. It is permanent and not subject to loss, removal or destruction, and, consequently, a stipulation in the bond for its security is unnecessary, and not contemplated by law.

"If, however, it be contended that the same doctrine ought to apply to all decrees merely for the sale of mortgaged property, whether personal or real, it by no means follows that it ought to be extended to that class of cases where personal property is attached by a proceeding in chancery, instituted for the purpose of obtaining payment of the complainant's demand, where the debtor has a right to retain the property by executing a bond, es-

pecially when the appeal is taken by the debtor himself, having the property in his possession at the time. The effect of the appeal may be to diminish very materially, if not to destroy, the security of the complainant's demand, by postponing the execution of the decree, until the sureties in the bond executed by the debtor become insolvent, and the property itself be consumed or disposed of, and placed beyond the reach of the creditor.

"In the case of *Worth v. Smith*, 5 B. Monroe, 504, it appeared that a number of creditors were proceeding at the same time to subject, by attachments, the steamer, *John Mills*, to the payment of their several debts; that the steamer had been sold, and the proceeds of the sale were under the control of the court. In that state of case, a contest arose among the creditors about the disposition of the fund; and part of the creditors being dissatisfied with the decree of the chancellor upon the subject, appealed to this court, and the decree was affirmed. A suit was then brought by the preferred creditors against the surety in the appeal bond, and it was held that he was only liable for the costs and damages awarded by this court, and not for the sums decreed to the creditors out of the fund for distribution. The ground of the decision was, that the appeal did not affect the security of the fund; that, notwithstanding the appeal, it remained under the control of the chancellor, who was not thereby restricted from taking any step which he might deem proper to secure it. This case does not, however, settle the principle that an appeal taken by the debtor from a decree to sell personal property which had been attached and remained in his posses-

sion, would not impose any liability upon the obligors in the appeal bond, for the amount of the decree. It seems rather to authorize an opposite inference, inasmuch as in the case last mentioned, the appeal would have the effect to suspend the action of the chancellor altogether, and deprive him of all control over the property, and of all power to provide for its security.

“But, let this question be disposed of as it may when it arises, the decree in this case, in our opinion, partakes of the nature of a personal decree, and was virtually, and in effect, a decree against the parties for whom the defendant became surety in the bond, and, consequently, is not within the operation of the principle applicable to the cases where the proceedings are exclusively *in rem*.

“The statutes under which the proceeding was instituted in the chancery court, made the defendants liable to the action of the party aggrieved, either at law or in chancery (1 Statute Law, 260), so that the chancellor had the power to render a personal decree against them for the sum adjudged to the complainant. The boat or vessel, in which the slaves were removed out of the limits of the commonwealth, is also made liable, and may be condemned and sold to pay and satisfy the damage sustained by the complainant, and the costs of suit. But the proceeding against the boat is merely ancillary to the main object of the suit, and intended to aid in its accomplishment, by furnishing means to be applied to the satisfaction of the decree. The proceeding was not exclusively *in rem*, but was both *in rem* and *in personam*.

“The damages sustained by the complainant had been ascertained,

and a decree rendered for the amount. The defendants had been required to produce the attached property, and had failed to comply with the requisition. The chancellor could have ordered an execution to issue against them immediately, for the sum decreed and costs of the suit, or could have enforced the payment of the amount by proceeding against the parties in the bond executed for the forthcoming of the property. In this attitude of the case, the parties agreed that the decree pronounced should be treated as a final decree, and the defendants obtained an appeal. The effect of the appeal was to suspend the execution of the decree, and prevent the chancellor from ordering an execution to issue against the defendants, or to enforce the bond. The decree, as it was rendered, would not have authorized an execution to issue against the defendants without an additional order; but still the decree was personal, and imposed upon the defendants the duty to pay the money to which the complainant was entitled, and the enforcement of this duty was prevented by the appeal. There is a clear distinction between this case and the cases that have been referred to. In those cases the defendants were not personally liable, and the chancellor had no power to order an execution to issue upon the decree. In the case of *Worth v. Smith*, the appeal was not taken by the debtor, but by part of the creditors, whose claims had been postponed, and who, of course, were in no manner responsible for the fund in contest, and against whom no decree had been rendered for the payment of money. And in that case, the court said, that as the surety might have executed the bond alone, without his

In Maryland, where the appeal has not been prosecuted to effect, the rule of damages and the extent of recovery will depend on the loss and injury sustained by reason of the stay of execution on the judgment appealed from.¹ In an action on the appeal bond, the measure of damages is the actual injury suffered by the appellee from the delay, in whatever manner it arises.² If the fund pledged was unequal to the payment of the debt at the time of the decree, the intermediate accruing interest is a clear loss to the plaintiff, occasioned by the delay, and should be made the standard in the absence of other injury.³ By such a bond in a foreclosure case which is *in rem*, the obligors are not bound on affirmance of the decree to pay the mortgage debt, nor to make good to that extent any deficiency in the proceeds of the sale of the land; nor did they stipulate that the land should sell for enough to pay even the principal of this debt; but if the deficiency was increased by accumulation of interest by the delay of the appeal, or by the intermediate depreciation of the mortgaged property, such increased deficiency would be an item of damage covered by the bond.⁴

Where the operation of an injunction was suspended by an appeal, and it was held that such was the effect of an appeal from an order allowing it — on the affirmance of the order, if the thing on which it was intended to operate should exist in

principal, if he were to be made liable for the fund in contest, which had been decreed to the preferred creditors, his liability would exceed that of his principal, against whom no decree for the payment of the fund, or any part of it, had been rendered. That reasoning, however, does not apply to this case. Here a decree had been pronounced against the principals of the surety. They were personally liable for the sums decreed. The appeal was evidently taken to prevent the enforcement of that liability. The nature of the proceeding had undergone a radical change. It had become, by the failure to deliver the property attached, exclusively personal. It was no

longer *in rem*, for there was no property for the chancellor to act upon. He could have proceeded against the surety in the bond, but his liability was personal. The remedy, however, was not confined to the liability of the surety, but extended to the defendants, who were personally liable for the amount of the decree by the express provisions of the statute, which authorizes the party aggrieved in such a case to sue in chancery.

¹ Keen v. Whittington, 40 Md. 489.

² Wood v. Fulton, 2 Har. & Gill, 71.

³ Id.; Jenkins v. Hay, 28 Md. 547.

⁴ Id.: Cook v. Marsh, 44 Ill. 178; Utica Bank v. Finch, 3 Barb. Ch. 293.

specie in the defendant's possession, then the injunction is restored to its original vigor; but if the thing is consumed or disposed of, then the complainant must proceed on the bond which was given to indemnify him from all loss and injury which he may sustain by reason of the appeal. And the measure of damages is the value of the property or thing so disposed of, and lost to him.¹

Where a judgment in replevin for the return of the goods is affirmed, the value of the goods (if they have not been restored), and the costs of suit, would seem to be the true standard by which the damages of the appellee should be measured on a suit brought on the appeal bond.² In Vermont, where the condition of the bond is, that the appellant will prosecute his appeal to effect, or pay all intervening damages occasioned by the appeal, in estimating such damages, the property which the appellant had at the time of the appeal, and all that he acquired during its pendency, is to be taken into the account. The plaintiff is entitled to recover the value of his chance of collecting his debt during the time of the suspension of his execution.³ A lessee in possession of premises subject to a right of dower is not liable to heirs not in possession for rents and profits pending an appeal from an order appointing commissioners to make partition.⁴ Nor is an appellant appealing from the allowance of a will liable on such a bond, in case of affirmance, for extra expenses of the executors in prosecuting the suit subsequent to the appeal, beyond the amount of taxable costs; but where such appeal necessitates the appointment of a special administrator, the extra expenses of such special administration, beyond the amount that would have been necessary, if the estate had been settled by the executors, without the intervention of the appeal, constitute intervening damages recoverable on the bond.⁵ The legislature intended only to provide for the secu-

¹ *Blonnhelm v. Moore*, 11 Md. 365; *Everett v. State*, 28 Md. 190.

² *Karthaus v. Owings*, 6 Har. & John. 134.

³ *McGregor v. Balch*, 17 Vt. 562.

⁴ *Stockwell v. Sargent*, 37 Vt. 16.

⁵ *Sargent v. Belding*, 20 Vt. 297.

By statute in Illinois passed in

1865, it was provided that appeals shall be allowed to the supreme court from all decrees, judgments and orders of inferior courts from which writs of error might be lawfully prosecuted; and in granting appeals, inferior courts shall direct the condition of appeal bonds, with

urity and recovery of intervening damages whenever the appellee should have judgment therefor, and not to create any new liability. The appellant is to give security for intervening damages, provided the other party should be found entitled to recover any.¹ And where interest is recoverable as intervening damages, they should be moved for and allowed on the hearing of the appeal.² If the appellee is entitled only to costs, a bond to pay all intervening costs and damages will secure no more than costs.³ So in a bond given on appeal, the condition of which was to pay all such costs as the obligee might recover, the costs which accrued before the bond was made, as well as afterwards, are properly included.⁴

A statute of Massachusetts, regulating appeals in actions by landlords against tenants, provided that if the complainant appeal, he shall recognize to pay all intervening damages and costs, and to prosecute his appeal with effect; that if the defendant appeals, he shall recognize to pay all rent due and in arrears, and all intervening rent, damages and costs; and that the court of common pleas shall, whenever any appellant thereto shall fail to prosecute his appeal, affirm the former judgment upon the appellee's complaint, and award such additional damages and costs as have arisen in consequence of the appeal. Under these provisions it was contended that it was competent for that court to render judgment in favor of the landlord, when appellee, after defaulting the appellant, for the intervening rent and damages; that "additional damages include such rent, because he is damaged by being kept out of possession, and include likewise damages for the timber and wood removed, and any injury to the buildings. The court suggest that the case might be

reference to the character of the decree, judgment or order appealed from. A bond was given on appeal from a decree dissolving an injunction which restrained the use of land, conditioned to prosecute the appeal and pay the amount of the judgment, costs, interest and damages rendered and to be rendered in case the decree should be affirmed. No judgment was rendered in either

court that the appellee recover the rental value of the real estate; it was, therefore, held that the obligors were not bound for it. *McWilliams v. Morgan*, 70 Ill. 62.

¹ *Stearns v. Brown*, 1 Pick. 530.

² *Id.*

³ *Swan v. Pecquet*, 4 Pick. 465.

⁴ *Manufacturing Co. v. Barney*, 45 N. H. 40.

likened to that of interest accruing subsequently to the commencement of the action; but reply, that interest is merely incidental, and therefore is brought up to the time of the judgment; that, with the exception of interest, no damages could be recovered except what had accrued before the action was commenced; that the phrase "intervening damages" seems to have been used without any definite meaning; it is the usual language in regard to appeals, and is employed in respect to appeals by the plaintiff where there can be no intervening damages. The court say: "If the tenant keeps out the owner wrongfully, and there were no other remedy, the statute might perhaps be so construed as to give this remedy, though it would be an awkward construction. There can, however, be no doubt that an action of debt will lie on the recognizance, and a previous judgment of the common pleas for intervening damages is not necessary to sustain the action. This view is confirmed by the clause in the recognizance, to pay rent in arrear. That is not intervening rent, and a remedy for it would necessarily be upon the recognizance."¹

INSTANCES OF MORE SPECIFIC CONDITIONS AND LIABILITY THEREON. The obligations on appeal, required by later legislation, to stay execution, are generally more precise, specifying the liability with more particularity. They are usually required, in terms, to secure the payment of money judgments and decrees with the damages and costs which may be awarded on the appeal; and, in other cases, likewise, such peculiar damages as result from the appeal according to the nature of the case. What

¹ *Braman v. Perry*, 12 Pick. 118. *Davis v. Alden*, 2 Gray's Rep. 309. A lessee, who, on appealing from the judgment of a justice of the peace or police court in an action on the Revised Statutes, ch. 104, recognizes, pursuant to statutes of 1848, ch. 142, to pay all intervening rent, and all damages and loss which the lessor may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done to the

premises during such withholding, is liable *prima facie*, and in ordinary cases, to payment at the rate reserved in the lease, until the recovery of possession by the lessor, although the buildings on the premises be meanwhile destroyed by fire; and is responsible for all waste, actual and permissive, and for all losses, including the destruction of the building, if not proved to have been caused by inevitable accident.

damages and costs may be awarded on appeal, will be considered under the next head. The obligation as to the judgment or decree appealed from, as well as to the damages and costs on the appeal, is simply to pay them, or that appellant shall do so, or such part of the judgment or decree below as shall be affirmed. Where the bond or undertaking thus binds the sureties simply for the result of that appeal, it has reference to the decision of the court to which that particular appeal is taken. If the judgment or decree below is affirmed, their liability is fixed, subject, of course, to exoneration if that judgment of affirmance shall afterwards be reversed, on another appeal, when, in pursuance of the mandate of a higher court, it is displaced by a judgment of reversal. But if a second appeal, removing the case to a higher court, with another set of sureties, results in a second affirmance, the liability of the first set of sureties is not thereby increased; they are not liable for the costs and damages on the second appeal; nor are the two sets of sureties co-sureties.¹ A reversal of a judgment on a hearing of the first appeal will not discharge the sureties, if such judgment of reversal be itself afterwards reversed on rehearing or appeal.²

A surety on an appeal bond is only liable, like other sureties,

¹ *Hinckley v. Krutz*, 58 N. Y. 583. See *Post v. Dorennnes*, 1 Hun, 521; *Shankland v. Hamilton*, 1 N. Y. Sup. Ct.; *Smith v. Crouse*, 24 Barb. 432; *Hubner v. Townsend*, 8 Abb. 234.

A defendant in the circuit court of the United States gave bond, with a surety, conditioned to keep and perform the final decree in the cause and pay all sums which might therein and thereby be decreed to be paid by him. The circuit court rendered a final decree against him for damages and costs, from which he appealed to the supreme court of the United States, and gave bond, with a different surety, to pay all such costs as the court should decree to be paid to the plaintiff upon affirmance of the decree of the circuit

court. The supreme court affirmed that decree, with costs and interest; and, pursuant to its mandate, the circuit court decreed that its own former decree be affirmed, with costs and interest, and that execution issue for the sum found due by that decree, with interest from its date, and for the further amount of costs decreed by the supreme court, and the costs taxed in the circuit court upon the return of the mandate. Held, that this was the final decree in the cause, within the meaning of the first bond. *Jordan v. Agawan* W. Co. 106 Mass. 571.

² *Robinson v. Plympton*, 25 N. Y. 484; *Richardson v. Kraff*, 47 How. Pr. 286; affirmed, 60 N. Y. 634; *Gardner v. Barney*, 24 How. Pr. 467.

on the express terms of his contract.¹ Where the undertaking is to pay the amount of the judgment, and all damages which shall be awarded on the appeal, if the judgment be affirmed, and the order of affirmance is interlocutory and conditional, providing for a new trial in a certain event, the undertaking does not extend to the judgment on such new trial. The final judgment thus obtained is not an affirmance of the first judgment. The sureties were only bound for the first judgment when affirmed.²

The code has adapted the security on appeal, for consequential damages, where a stay of execution is desired, to the special exigence of particular cases. An appeal of itself does not operate to stay proceedings.³ In an action for specific performance

¹Smith v. Huesman, 30 Ohio St. 662; Lang v. Pike, 27 Ohio St. 498; Hall v. Williamson, 9 Ohio St. 23; Myers v. Parker, 6 Ohio St. 501; Hamilton v. Jefferson, 13 Ohio, 421; Fullerton v. Miller, 22 Md. 1, Rice v. Rice, 13 Ind. 562.

²Poppenhuyser v. Suley, 3 Keyes, 150; Wilson v. Churchman, 6 La. Ann. 468; Smith v. Huesman, 30 Ohio St. 662.

³The following sections of the New York code have been extensively adopted, or with slight variations, in other states: § 334. To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding \$500, or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

§ 335. If the appeal be from a judgment directing the payment of money, it will not stay the execution of the judgment, unless a written undertaking is executed on the part

of the appellant, by at least two sureties, to the effect, that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant on the appeal.

§ 336. If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court or be placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into, on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, or county judge, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

§ 337. If the judgment appealed from directs the execution of a conveyance or other instrument, the

brought by a vendor against the vendee, a judgment was recovered establishing the amount due on the contract, adjudging that the defendant should be barred and foreclosed of all right, claim, etc., to the land, and directing a sale thereof by the sheriff, and payment out of the proceeds of the amount adjudged to be due, and in which there was no provision for the payment of any deficiency. The defendant appealed, and gave an undertaking according to section 335 of the New York code, instead of section 338; it recited that a judgment had been recovered against the defendants. The judgment was affirmed, but no damages awarded upon the appeal, and the costs awarded were paid. An action was brought on the undertaking, and it was held that though the undertaking was not in the proper form, yet as it secured the end for which it was given, and stayed all the proceedings on the judgment, it was valid as against the defendants who subscribed it; that as no amount was directed to be paid by the judgment, the defendants were only liable for the difference between the amount bid for the land at the time of the sale, and the amount which would have been bid at the time at which the judgment directed it to be sold, with interest on such amount to the time of the actual sale; but as no difference was proved, none could be presumed, and the plaintiff was only entitled to nominal damages.¹

It may be doubted that the damages held to be recoverable,

execution shall not be stayed by the appeal, until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

§ 338. If the judgment appealed from directs the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, he will not commit, nor suffer to be committed, any waste thereon; and

that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which the judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency, arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

¹Chamberlain v. Applegate, 2 Hun, 510.

if they had been proven, were within the contract.¹ But there being a recital of a judgment against the appellant, were not the sureties estopped from denying it? The case is briefly reported, and does not disclose whether the recital stated the amount. In a case in Illinois, the action was brought on an appeal bond conditioned to prosecute the appeal to effect, and pay the amount of the judgment, costs, interest and damages rendered and to be rendered against the appellant, in case the decree should be affirmed. Scott, C. J., remarking upon a similar point, observed: "It is urged by the defendants that the decree was *in rem*, and was not to be performed by Bischoff; and as the master in chancery has executed the decree by selling the property as directed, he and his surety are discharged from all liability created by the condition of the appeal bond. This is not, in our opinion, the true construction. The bond as set out in the declaration distinctly states a decree had been rendered against Bischoff, from which he had prayed an appeal. The object he had in view was to have the execution of the decree suspended until the cause could be reviewed in the supreme court, and the bond is expressly conditioned for the payment of the judgment, in the event the decree should be affirmed. The defendants are estopped, by the recitals in the bond, to deny what they solemnly admitted to be true, viz.: the existence of a decree against Bischoff; and the legal effect of the engagement is to pay it, in case it shall be affirmed on appeal, or be liable for the penalty of the bond."²

A statute of Indiana provides that "when any appeal is taken to the supreme court from a judgment in waste, or for the recovery of land, or the possession thereof, the condition of the appeal bond, in addition to the matters hereinbefore prescribed, shall further provide that the appellant shall also pay and satisfy all damages which may be sustained by the appellee for the mesne profits of the premises recovered, or for any waste committed thereon, as well before as during the pendency of the appeal."³ There being no such additional provision in the

¹ See *McWilliams v. Morgan*, 70 Ill. 62.

See *First Nat. Bank v. Rogers*, 13 Minn. 407.

² *George v. Bischoff*, 68 Ill. 236.

³ R. S. 633.

condition of the bond sued on, the plaintiff's claim for rents and profits was held not provided for; and though the bond was conditioned for the prosecution of the appeal, and there had been a breach of that condition.¹ In an action for an unlawful detainer, a judgment was rendered for the plaintiff below, and the bond on appeal was conditioned "to pay all costs of such appeal, and abide by the order the court may make therein, and pay all rent and other damages justly accruing to the plaintiff during the pendency of the appeal." The plaintiff sought to recover on the bond treble damages for which the plaintiff was liable, but it was held that the responsibility was limited by the terms of the bond, and the treble damages claimed were not covered by the phrase "other damages justly accruing," but only actual damages.²

¹ *Malone v. McClane*, 3 Ind. 532.

² *Chase v. Dearborn*, 23 Wis. 143. The case of *Post v. Doremus*, 1 Hun, 521, has some curious features, and is an example of liberal construction of the contract of the sureties to effectuate their obvious intention. The plaintiff had brought an action against one Hathorn, impleaded with one Robertson, which resulted in a verdict for the defendant. A motion for new trial had been denied at special term, and this order reversed on appeal to the general term, and an affirmative order for new trial made. Hathorn appealed to the court of appeals, and filed a stipulation as required by statute, that, if the order was affirmed, judgment absolute might be rendered against him upon such appeal; he filed an undertaking in the terms required by sections 334 and 335, "that the said appellant will pay all costs and damages which may be awarded against him on said appeal not exceeding \$500; and also that if the said judgment, so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant will pay the

amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal." The court of appeals affirmed the order, and judgment absolute was ordered in pursuance of the stipulation, with costs. The proceedings, however, were remitted to the supreme court, where the plaintiff's damages were assessed, costs adjusted upon notice, and without objection, and judgment entered for \$4,887.02, damages and costs. In an action on the undertaking, the court held that it included the judgment absolute rendered by the court of appeals, under section 11, subdivision 2 of the code, against the appellant, upon affirming the order, and that the plaintiff was entitled to a judgment for that amount with legal costs, including extra allowance.

Miller, J., referring to the undertaking, said: "The first part restricts the amount to a sum certain, which is specified. The second pro-

The condition of an appeal bond was to prosecute the appeal with effect, and satisfy and pay, in case of affirmance, the damages, charges and costs decreed below, and also all costs and damages that should be awarded by the appellate court. The appeal was from an order dissolving an injunction, and thereby continuing it in force, restraining the collecting or negotiating

vides for the payment of a judgment, or such part thereof as may be affirmed, when there was no judgment appealed from; and is entirely inapplicable to the order from which the appeal was taken. It may, I think, be regarded as redundant and superfluous, and considered as stricken out as surplusage. The third part is unrestricted in its terms, and, fairly interpreted, includes all costs and damages arising to the plaintiff by reason of the appeal. This is a legitimate and rational construction from the terms and language of the undertaking, and, I think, in judgment of law, is contained in it. (*Rogers v. Kneeland*, 10 Wend. 218.) . . . It is, I think, broad and comprehensive enough to embrace all costs and damages which might finally be awarded against the appellant, which necessarily would include the full amount of the judgment awarded by the court of appeals. . . . It is objected that it was for more than was required by section 334 of the code, which limits such an undertaking to the costs of the appeal, not exceeding \$500, and which is the only undertaking required upon such an appeal. It is true, that the first part of the undertaking embraces an appeal from an order under this section, but it does not of itself stay the proceedings in the court below; and the only way in which the proceedings in the court below can be stayed, after an order for a new trial has

been made, is by a motion directly to the court for that purpose, where the proper terms can be imposed as to security, so as to protect the respondent against loss, if the court of appeals should have affirmed the order, or, as in this case, directed a judgment in his favor. (*See McMahon v. Allen*, 22 How. Pr. 193.) The undertaking, therefore, under section 334, would not have stayed the plaintiff's proceedings, and the plaintiff would have been authorized to disregard the appeal, and could have proceeded, under the order granting a new trial, the same as if no appeal had been taken. No motion appears to have been made in the case, or any order specifying the terms on which a stay would be granted; but the bond was executed voluntarily, and perhaps for the very purpose of rendering any such motion unnecessary. It contained a provision which, I think, covered all costs and damages, and was amply sufficient for such a purpose. It was all which could have been required, and no further proceedings were taken by the plaintiff in the court below, after it was executed, until the judgment of the court of appeals, some six years thereafter. Although the undertaking was not given in pursuance of an order of the court, yet, inasmuch as it was for the benefit of the appellant, and he chose thus to avoid the necessity of making a motion for a stay, and the plaintiff accepted the undertaking instead of proceeding with the

of certain drafts. In an action on this bond, after affirmance of the order, the plaintiff sought to recover the value of those drafts which were lost by reason of the delay caused by the appeal, notwithstanding such damages were not decreed in the case in which the appeal was taken. But the court held that the liability of a surety could not be extended by implication beyond the terms of his contract; and that the damages proposed to be recovered were not within the bond.¹ Where the appeal bond is for costs and damages only, the sureties are not liable for the debt.² Damages, within the prescribed terms of

case, as he had a perfect right to do, I am not able to discover any valid legal ground which will relieve the defendant from liability." See *Reed v. Lander*, 5 Bush, 598; *Whitehead v. Boorum*, 7 Bush, 399; *Wade v. First Nat. Bank*, 11 Bush, 697.

¹ *Fullerton v. Miller*, 22 Md. 1.

² *Smith v. Erwin*, 5 Yerg. 296; *Banks v. Brown*, 4 Yerg. 198; *Gholson v. Brown*, 4 Yerg. 496; *Onderdonk v. Emmons*, 9 Abb. 187; *Stille v. Beauchamp*, 13 La. Ann. 474: Where the appeal bond recites the judgment, and sets forth the fact that the appellant has taken a suspensive appeal from such judgment, and a blank is left for the amount to be filled up, it will be presumed that the blank was left in order to ascertain by calculation the amount fixed by law for the suspensive appeal, and the party signing the bond will be bound for that amount.

Ward v. Bell, 18 Ind. 104: If the instrument given specifies no amount, or contains no penalty, the law will hold the obligors in it liable to the extent required by the statute, upon an appeal and supersedeas in such cases, on the ground of the intention of the parties executing the instrument to become liable to that extent. But sureties may expressly limit the amount of their liability by the terms of the obliga-

tion; and if they do, and the officer is satisfied with it and accepts it, they will not be bound beyond the amount named, but it proving insufficient, the officer may be liable for the deficiency.

Reeves v. Andrews, 7 Ind. 207: A sued B before a justice; B pleaded a set-off, and recovered a judgment. A appealed, and executed a bond after the statute, but in the court above dismissed the action. B thereupon sued him and his surety upon the appeal bond. Held, that he had a right to dismiss; that the dismissal operated to avoid the proceedings before the justice; that the obligors were estopped at this stage to deny that the appeal had been taken, and that the dismissal of the suit was a breach of the condition of the bond, but that the obligor was entitled to only nominal damages, unless special damages were alleged and proved.

Raney v. Baron, 1 Branch (Fla.), 327: An appeal bond was conditioned that A should pay said damages so recovered by said B against him, and costs, in case the judgment of the said court should be confirmed. Held, that the surety in the bond was not liable for the ten per cent. damages awarded by the appellate court against the appellant, but only for the judgment and costs in the court below.

an appeal bond or undertaking, may be disallowed when they exceed the rights of the party claiming, and the legal liability imposed on the other; as where a general form of undertaking is required for a class of cases generally similar, but distinguishable by individual differences, and the liability contended for does not exist in the particular case. Thus, in an action upon an undertaking executed by the defendant in a foreclosure case, upon appeal, pursuant to the section of the California practice act which corresponds with section 338 of the New York code,¹ it was considered by the court that the legislature could not have intended by that section to increase the liability of the principal debtor. It was, therefore, held, that the provision in regard to use and occupation should be understood as referring to those cases in which the creditor is entitled to the value of the use; and that an undertaking to pay what the creditor has no legal right to is not binding on the sureties; that as this section includes orders as well as judgments, the provision in question applies more particularly to judgments and orders directing a delivery of possession.² If all of several plaintiffs or defendants appeal and execute a joint bond, as they ought, each is answerable for the entire amount. If one alone execute, he is bound for the whole.³

INTEREST AND DAMAGES AWARDED ON APPEAL.—By section twenty-three of the judiciary act, it is provided that where the supreme court shall affirm the judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs, at their discretion. There

Under a bond which operates as a supersedeas, and conditioned "to pay all costs in case the decree or order of the circuit court in chancery shall be affirmed," covers as well the costs decreed and taxed to the appellee in the court below, as to those in the appellate court. *Daly v. Litchfield*, 11 Mich. 497.

By the Tenn. Code, § 3162, in actions founded upon liquidated accounts, signed by the party to be charged therewith, bonds, bills sin-

gle, etc., upon an appeal in the nature of a writ of error, the bond shall be taken, and the securities bound for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the superior court where the cause may be finally tried. *Patrick v. Nelson*, 2 Head, 507.

¹ Ante, p. 92.

² *Whitney v. Allen*, 21 Cal. 233.

³ *Young v. Young*, 2 J. J. Marsh, 72; *Brown v. Hancock*, 13 Tex. 21.

are similar statutes in the states, but there is generally a limitation to a certain per cent. In the federal courts, the rate and limit were fixed by rule in 1803 and 1807 at ten per cent. per annum on the amount of the judgment to the date of affirmance, where the suit was for mere delay, and six per cent. where there was a real controversy. In both cases, the interest was computed as part of the damages, and had to be specially allowed. If, upon the affirmance, no allowance of interest or damages was made, it was equivalent to a denial of interest or damages; and the circuit court in carrying into effect the decree of affirmance, could not enlarge the amount thereby decreed, but was limited to the mere execution of the decree in the terms in which it was expressed.¹ There was no interest or damages after the date of affirmance, unless so allowed, until 1842, when it was provided by act of congress, "that on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed and may be levied by the marshal, under process of execution issued thereon, in all cases where by the law of the state in which such circuit or district court shall be held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such state."²

In 1852, the supreme court, by rule 62, still further extended the provision for interest; and both interest and damages are now regulated by rule 23, which declares: 1. The interest is to be calculated and levied from the date of the judgment below, until the same is paid, at the same rate as interest on judgments in the state courts. 2. That where a writ of error delays the proceedings on a judgment, and appears to be sued out for delay, ten per cent. in addition to the interest is to be allowed upon the amount of the judgment. 3. The same rule is to be applied to the decrees for the payment of money in cases in chancery, unless otherwise ordered by the court. This third clause is intended, doubtless, to adopt for chancery cases

¹ Boyce, Ex'r, v. Grundy, 9 Pet. 275; Perkins v. Fournequet, 14 How. U. S. 313. ² 5 Stat. 508.

the "same rule" as to interest only. The second clause can only be applied by an affirmative finding that the proceeding has been taken for delay; and hence is not a rule which could take effect unless otherwise ordered. The court, however, under section 23 of the judiciary act, has authority to award just damages and single or double costs, at its discretion, as well in equity as in law cases. In admiralty a different rule as to interest or damages prevails. In such cases, there is a discretionary power to add to the damages allowed in the court below, further damages by way of interest. But this allowance of interest is not an incident of affirmance, affixed to it by law or by rule of court. If given by the court, it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment.¹ No damages will be allowed on appeals and writs of error, except on money judgments or decrees.² They are allowed for delaying the plaintiff by appeal or writ of error, where delay is the object, and there is no ground or expectation of reversal in whole or in part.³

The court will not award damages unless the proceeding is, in this sense, taken in bad faith.⁴ They have been allowed for the reason that all the questions raised have been previously settled by the court of last resort, or are decided by reference to plain elementary principles;⁵ and also where there is no bill of exceptions, or statement of facts, and no error is suggested or appar-

¹ Hemmingway v. Fisher, 20 How. U. S. 255; Phillips' Practice, 191.

² Arrowsmith v. Rapelge, 19 La. Ann. 327; Long v. Robinson, 13 La. Ann. 465; Hodges v. Holeman, 5 Dana, 136.

³ Cotton v. Wallace, 3 Dall. 302; Barrow v. Hill, 13 How. U. S. 54; Lathrop v. Judson, 19 How. U. S. 66; Kilbourne v. State Institution, 22 How. U. S. 503; Sutton v. Bancroft, 23 How. U. S. 320; Jenkins v. Banning, 23 How. U. S. 455; Prentice v. Pickersgill, 6 Wall. 511; Campbell v. Wilcox, 10 Wall. 421; Warner v. Lessler, 33 N. Y. 296; Moher v. Carman, 38 N. Y. 25; Winfield v. Potter, 38 N. Y. 67; Murray

v. Mumford, 2 Cow. 400; Lehone v. Keyes, 2 Nev. 361; Ramsey v. Davis, 20 Wis. 31; Russell v. Williams, 2 Cal. 158; Magruder v. Melvin, 12 Cal. 559; Cudy v. Scaniker, 1 Idaho, 198; Whittlesey v. Sullivan, 33 Mo. 405; Owings v. McBride, 32 Mo. 221; Robinson v. Starley, 29 Ind. 298; Hutchinson v. Ryan, 11 Cal. 142; Wright v. Sanders, 3 Keyes, 323; Amory v. Amory, 91 U. S. 356.

⁴ Story v. Bird, 8 Mich. 316; Hart-ridge v. McDaniel, 20 Ga. 398; North W. Life Ins. Co. v. Starkweather, 38 Wis. 361; Morse v. Buffalo Ins. Co. 30 Wis. 534.

⁵ Pinkham v. Wemple, 12 Cal. 449.

ent in the record;¹ and in some states for default in filing transcript;² in not taking other necessary steps;³ or on abandonment of the appeal.⁴ But in Georgia, the mere fact that the appellant did not submit evidence to support his defense, or that he failed to prosecute his appeal, does not show that his appeal was frivolous, so as to subject him to damages.⁵ The same appears to be the rule in Vermont.⁶ And if there is error in the judgment the court will not award damages, even though the error is so small that they refuse to disturb the judgment.⁷ Nor will they allow damages where the appeal proves unsuccessful by a change in the law, as by the emancipation of slaves.⁸ Where the court below erroneously excluded evidence necessary for the recovery of double damages and the verdict and judgment were given for single damages,⁹ where the appellants are not themselves indebted to the appellees, and no decree for money has been rendered against them;¹⁰ or where the decision involves questions of fact and the evidence is conflicting,¹¹ no damages for a frivolous appeal will be allowed. Nor will they be awarded to the respondent upon affirmance of a judgment fully paid and satisfied before the taking of the appeal. This rule was applied to a case where the plaintiff in a foreclosure decree purchased the property at the sale for the full amount of the debt, including costs and interest, and the sale had been confirmed before the appeal. It was considered that the statute providing for damages on affirmance did not reach such a case, or, at least, was quite inoperative, for there could be no delay of payment to complain of arising from the

¹ *Chambers v. Hodges*, 3 Tex. 517; *Whittlesey v. Sullivan*, supra; *Owings v. McBride*, 32 Mo. 221.

² *Anon.* 11 Ill. 87.

³ *Stafford v. Anders*, 12 Fla. 211; *Hall v. Kennedy*, Sneed (Ky.), 124.

⁴ *Hold v. Meyer*, 7 La. Ann. 18.

⁵ *Gilmore v. Wright*, 20 Ga. 198; *Hall v. Tommy*, 30 Ga. 762. See *Madison, etc. R. R. Co. v. Briscoe*, 18 B. Mon. 570.

⁶ *Pearse v. Goddard*, 1 Tyler, 373.

⁷ *Simons v. Burrows*, 6 La. Ann. 358.

⁸ *Henderson v. Montgomery*, 18 La. Ann. 211.

⁹ *Wadell v. Chicago, etc. R. R. Co.* 20 Iowa, 9.

¹⁰ *Rowan v. Pope*, 14 B. Mon. 102. See *North W. Life Ins. Co. v. Irish*, 38 Wis. 361.

¹¹ *Austin v. Moore*, 16 La. Ann. 218.

appeal.¹ And part payment of the judgment below will relieve from damages *pro tanto*.² So, where a supersedeas bond is executed, but a supersedeas, though necessary to stay proceedings, is not actually issued, no damages will be allowed.³

¹ North W. Life Ins. Co. v. Irish, 38 Wis. 361.

² Brady v. Holderman, 19 Ohio, 26.

³ Reed v. Lander, 5 Bush, 598; Whitehead v. Boorum, 7 Bush, 399; Wade v. First Nat. Bank, 11 Bush, 697.

CHAPTER II.

NOTES AND BILLS.

The principal sum — Want or failure of consideration — Partial want of consideration — Partial failure of consideration — Where part of the consideration is fraudulent or illegal — Parol evidence to show defect of consideration — Amount recoverable against drawer and indorsers — Interest on notes and bills — As to maker or acceptor — As to drawer or indorsers — Notes and bills must be payable in money — Re-exchange and damages on dishonored bills — When not recoverable — Stipulations for attorney fees and costs — Value of notes and bills.

PROMISSORY NOTES AND BILLS OF EXCHANGE.—The amount recoverable on these commercial instruments is not the same against all parties. Their contracts are not the same; they are frequently governed by different laws. Each must pay such damages as result naturally and proximately from a breach of his particular contract, as interpreted by law.

The *maker of a note* enters into an express agreement. He agrees absolutely to pay a sum certain, either presently or at a specified time in the future, to a person named, or to his order, or the bearer. When notes are drawn according to the usual forms, their requirements are plain to the common understanding. These forms are, however, sometimes departed from, and not being formal and precise in language, the short and indeterminate expressions used require interpretation.

The liability of an *acceptor of a bill of exchange* is similar to that of a maker of a promissory note. His agreement is to comply with the request contained in the bill. An absolute acceptance is an engagement to pay according to the tenor of the bill, and a conditional or partial one obliges him to pay according to the tenor of the acceptance.¹ He is primarily and originally liable to pay the bill, but this liability originates in the acceptance, and he is under such obligation only as attaches by his acceptance.²

¹Thomas v. Thomas, 7 Wis. 476;
Chitty on Bills, 303; Story on Bills,
§ 238; 1 Par. on Cont. 281.

²Chitty on Bills, 304; Anderson v.
Anderson, 4 Dana, 352.

The measure of damages for non-performance of an agreement to accept for the drawer's accommodation, a draft which is still in his hands, is the loss and inconvenience thereby occasioned to him, and not the amount of the draft.¹ Where the drawer, however, draws without authority, he cannot recover damages he is compelled to pay in consequence of the draft being returned protested.²

A contract results from an acceptance as absolute and certain as from making a note. The amount payable at maturity by the acceptor or maker is ascertained from the face of the paper by similar rules.³ After default, the sum recoverable by the holder is also determinable against both by like rules; but the acceptor stands in a peculiar relation to the drawer, and the drawer to indorsers, as do also the indorsers of a bill to each other, in respect to re-exchange, or damages in lieu thereof. These peculiarities will receive attention in the proper connection.

The sum recoverable from the several parties includes principal and interest, together with the notarial fees where a protest is necessary or authorized to fix the liability of secondary parties,⁴ and sometimes exchange and re-exchange.

PRINCIPAL SUM.—A note or bill is by definition made for a *sum certain* payable in money. Hence, if it is valid, and subject to be enforced according to its terms, that precise sum as principal is to be recovered.

Where the party sued is liable for the full amount, the person having the legal title may recover it, though some other person is entitled to the proceeds; if the suit be brought with his consent and for his benefit, as where the plaintiff is an agent for collection; or although the beneficial interest of such plaintiff extends only to a part of the amount due. The surplus, beyond his own demand, would in such case be held by him as trustee

¹ *Hsley v. Jones*, 12 Gray, 260.

² *Ronvert v. Patton*, 12 S. & R. 253.

³ *Story on Prom. Notes*, § 114.

⁴ *Doughty v. Hildt*, 1 McLean, 334; *City Bank v. Cutter*, 3 Pick. 414; *Noyes v. White*, 9 Kan. 640; *Knowles v. Armstrong*, 15 Kan. 371; *Ticknor v. Branch Bank*, 3 Ala. 135; *Curtis*

v. Buckley, 14 Kan. 449; *Woolley v. Van Valkenburgh*, 16 Kan. 20; *Loud v. Merrill*, 47 Me. 351; *Weldon v. Buck*, 4 John. 144; *Bowen v. Stoddard*, 10 Met. 375; *Cook v. Clark*, 4 E. D. Smith, 213; *Merritt v. Benton*, 10 Wend. 116.

for any other party entitled to receive it. Thus, if a bill be drawn in the regular course of business, as for money really due from the drawee to the drawer, in such case, in order to avoid several actions, an indorsee, though he has not given the full value of the bill, may recover the whole sum payable, and he will be the holder of the overplus, as trustee for the indorser.¹ And

¹Chitty on Bills, *677. The interest of the acceptor is not liable to be affected by the state of accounts, or equities, between the other parties connected with the bill; and the only question in which he has any interest is, whether the party seeking to enforce payment by him is the legal owner of the bill, and whether recovery by and payment to such party will be a satisfaction and absolute discharge of his liability upon the bill. *Jones v. Bradhurst*, 9 M. G. & S. 113, per Cresswell. But *Wilde, C. J.*, said: "Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims against any one upon the bill."

This case was very thoroughly argued and very carefully considered upon principle and authority. And it was held that a bill accepted for value may be collected by the holder in an action against the acceptor, notwithstanding it has been paid to such holder by the drawer; it not appearing that such payment

was made in behalf of the acceptor. It affirms the right of the holder to recover for the use of the party paying him, citing *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 1 M. & P. 11 (17 Eng. C. L.); *S. C.* 4 Bing. 390; 3 C. & P. 134; *Reed v. Feemival*, 1 C. & M. 533; *Ex parte DeTartel*, 1 Rose, 10. But if the acceptor has a defense which would be good against the bill in the hands of the party who has paid it to the plaintiff, he may use that as an equitable defense to the extent that the action is prosecuted for the use of that party. *Thornton v. Maynard*, L. R. 10 C. P. 695. To a declaration by the holder against the acceptor of several bills of exchange, the defendant pleaded by way of equitable defense, that the drawers became bankrupt, and that the plaintiff received 425*l.* as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers. *Held*, a good equitable defense *pro tanto*. *Agra v. Lughten*, Law R. 2 Ex. 56; *Cochrane v. Green*, 9 C. B. (N. S.) 448; *Elkin v. Baker*, 11 C. B. (N. S.) 526; *Clark v. Cost*, 1 Cr. & Ph. 154. Lord Coolidge, C. J., said: "These cases . . . appear to establish the soundness of these two propositions: 1. That the holder, having been paid a part of the bill by the drawer's trustees, sues as regards that sum as trustee, for the benefit of the drawer's

if the holder receive part payment of the first indorser, he may, nevertheless, recover the whole against the drawer and acceptor; though if the acceptor pay a part, then only the residue can be recovered against the drawer.¹

This rule, permitting the holder of a bill or note to recover more than is due to himself, is limited to cases where there is some other person entitled to receive from the defendant the overplus of what is due to the plaintiff; and, if there be no such person, the plaintiff will be permitted only to recover what is due to himself.² But in case of bankruptcy, though the holder may prove the whole amount under a commission against a remote party, and receive a dividend until his debt is satisfied, he cannot prove for more than the sum actually due on the balance of account against his immediate indorser.³

In cases where there is a defense to a note or bill, in whole or in part, it is unavailable, and the sum payable according to its face is recoverable, if the paper has passed into or through the hands of a *bona fide* holder by successive transfers. The title of an indorsee is the title of all the prior parties.⁴ As soon as it comes into the hands of a holder, as to whom it is not subject to defenses and equities good between antecedent parties, its character as a negotiable security is established; and he can transfer it with that immunity.⁵ But if the holder has paid less

trustee; and 2. That where the plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which but for the intervention of the trust could have been a set-off at law, such claim can be set off in equity. If, then, these two propositions are sound—and we think they are,—it follows that the plea is good, unless the bankruptcy makes a difference. We think it does not. *Bewhradsky v. Kuhn*, 69 Ill. 547; *Miffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Stark. 304.

¹ Chitty on Bills, *677; *Walwyn v. St. Quinten*, 1 B. & P. 658; *Johnson v. Kennion*, 2 Wils. 262; *Ex parte DeTartel*, 1 Rose, 10.

² Chitty on Bills, *677; *Pierson v. Dunlop*, Cowp. 571; *Steel v. Bradfield*, 4 Taunt. 227; *Jones v. Hibbert*, 2 Stark. 304.

³ *Ex parte Bloxham*, 6 Ves. 449, 600; *Ex parte Liers*, 6 Ves. 644; Chitty on Bills, *678.

⁴ *Edwards v. Jones*, 2 M. & W. 414; *Hunter v. Wilson*, 4 Exch. 489; *Thudemann v. Goldschmidt*, 1 De Gex, F. & J. 10; *Robinson v. Reynolds*, 2 Q. B. 202, 210; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *United States v. Bank of Metropolis*, 15 Pet. 393.

⁵ *Hascall v. Whitmore*, 19 Me. 102; *Thomas v. Newton*, 2 C. & P. 606; *Smith v. Hiscock*, 14 Me. 449; *Solomon v. Bank of England*, 13 East,

than full value for the paper, his privilege, as *bona fide* holder to exclude defenses, attaches only in respect to the amount he has paid. As to the remainder there is no privilege; it is open to defenses.¹

135, note (b); Haly v. Lane, 2 Atk. 182; Woodman v. Churchill, 52 Me. 58; Woodworth v. Huntoon, 40 Ill. 131; Bassett v. Avery, 15 Ohio St. 299; Watson v. Flanagan, 14 Tex. 354; Masters v. Ibberson, 8 C. B. 100; Prentice v. Zane, 2 Gratt. 262; Hereth v. Merchants' Nat. Bk. 34 Ind. 380; Simonds v. Merritt, 33 Iowa, 537; Peabody v. Rees, 18 Iowa, 571; Mornger v. Cooper, 35 Iowa, 257; Boyd v. McCann, 10 Md. 118; Cook v. Larkin, 19 La. Ann. 507. See Kost v. Bender, 25 Mich. 516.

¹Huff v. Wagner, 63 Barb. 215; Hargee v. Wilson, id. 237.

In Huff v. Wagner, Talcott, J., thus discusses this point: "The special term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value he has paid. This, I think, is correct. The protection of the holder in such cases, as in other cases where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. And this is the precise reason why a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded; namely, that he has lost nothing by his reliance upon the face of the paper. These principles are discussed and laid down in a very elaborate opinion of the

late chancellor, delivered in the court of errors in the leading case of Stalker v. McDonald, 6 Hill, 93, in which he expressly holds that if the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*; and refers with approbation to the case of Edwards v. Jones, 7 C. & P. 633, in which, in an action on a note for £100, the consideration of which was impeached by a plea, the plaintiff replied that it was indorsed to him for the consideration of £49. And he was only permitted to recover the £49 advance.

"The proposition sought to be maintained by the counsel for the appellant in this case, namely, that whatever may have been the consideration of the transfer of a negotiable note, if it was a valuable one, the holder, without notice of the invalidity of the note, may recover the entire face thereof, without reference to the amount paid by him for it, would produce most unjust and startling results. It would enable the holder of a stolen note for \$1,000 to recover the entire amount thereof from the maker, from whom it had been stolen, although the holder had purchased the same without notice, for only \$100 — a result revolting to common sense, and going far beyond affording that protection which public policy requires should be extended to parties who purchase negotiable paper for value. I see no reason for any distinction between the case of a purchaser for money, and one where

the note is exchanged for property. If such a distinction could be made, the maker of the note would have no protection. Such notes would then be used in the purchase of property, as in this case, instead of sold for money. The purchaser is fully protected against loss by being enabled to recover the full value of the property parted with on the purchase.

“The doctrine laid down in *Stalker v. McDonald* was also expressly held in *Williams v. Smith*, 2 Hill, 301, and in *Young v. Lee*, 18 Barb. 189, in which Mr. Justice Welles, delivering the opinion of the court, says: ‘It follows that the plaintiffs are *bona fide* purchasers and holders of the note upon which the action is brought, and entitled to recover from the indorsers the amount they paid for it, *and no more*.’ The case of *Young v. Lee* was affirmed on appeal. 2 Kern. 534. The same principle was asserted in *Cardwell v. Hicks*, 37 Barb. 458. The truth is, that in such cases the holder, except so far as he has parted with value, has no equity superior to that of the party defrauded. There is a remarkable silence on this point in most of the elementary works I have examined. It is, however, explicitly laid down in *Story on Bills*, § 188, that where a bill has been obtained by fraud, a *bona fide* holder can only recover the amount he has advanced. The English cases, where a question of this character appears to have been presented, appear, generally, to have been between the *bona fide* holder and the accommodation maker or indorser; and in such cases it has always been ruled that the holder only recovers the amount of his advances. See *Chitty on Bills*, 81; *Nash v. Brown*, id. 81, note 1; *Wiffen v. Roberts*, 1 Esp.

261; *Jones v. Hibbert*, 2 Stark. 304; *Simpson v. Clarke*, 2 Crompt. Mees. & Rosc. 343. I do not perceive any reason why a *bona fide* holder for value may not recover the full face of the note, without regard to the amount he has advanced, as well where he sues a mere accommodation maker, as where he sues one from whom the note was obtained by fraud. In either case the amount of the recovery is limited to the amount advanced by the holder; because there was no sufficient valid and valuable consideration for the making of the note; and the right to recover at all grows out of the advance which has been made by the holder, which gives it validity in his hands to that extent. I think the discussions and opinions in the English cases show that this point has not been considered debatable where the note was obtained by false and fraudulent representations. Indeed, I think that until quite recently it has been assumed at *nisi prius* in this state, that a holder of such paper, for value and without notice, was entitled to be protected to the extent of his advances, and no more. The point has been expressly decided in *Holman v. Hobson*, 8 Humph. (Tenn. R.) 127, and in *Bethune v. McCreary*, 8 Ga. 114.

“It is claimed, by the counsel for the respondent, that the case of the *Essex County Bank v. Russell*, 29 N. Y. 673, countenances the doctrine maintained by him. There a bank had discounted or purchased a note which was diverted, and gave as the proceeds of the discount a part in cash and the balance in a note held by it, made by one Brewster, and indorsed by other parties, which was part due and under protest. The bank was allowed to recover the whole amount of the diverted note,

on the ground that he was a bona fide holder for value, and upon the express ground that the Brewster note which constituted a part of the consideration on the purchase, although under protest, was worth its nominal amount, and was good and collectible. And the principle laid down in *Stalker v. McDonald*, on this point, seems to have been expressly recognized as law. Mr. Justice Hogeboom says, speaking of the plaintiffs (the bank): 'They were, therefore, on discounting this note, *bona fide holders of it for value, at least to the extent of the sum advanced in cash, on the discount; and to that extent, at all events, they would be entitled to recover in this action.* . . . It becomes necessary to determine whether the plaintiffs are *bona fide* holders of the note in suit, in such a sense as to exclude the defense of its misapplication, so far as respects the part of the discount which was appropriated to the purchase of the Brewster paper. *There was no want of consideration on the part of the plaintiff to the full amount of the note in suit, in the transaction in question. The Brewster note was, though overdue, good and collectible paper. It was worth its nominal amount, and was collectible for two years afterwards.* It was a chose in action which the plaintiff had a right to sell and transfer to Comstock. To the full extent of its value, it was a valuable consideration. The case of the *Park Bank v. Watson*, 42 N. Y. 490, is claimed by the counsel for the appellant to have overruled the former cases on the subject and to have established the doctrine for which he contends. In that case the Park Bank had surrendered notes held as collateral security for a debt due it, on receiving the notes

in suit, which proved to have been diverted. One of the notes surrendered was the note of Thomas Parks, shown on the trial to be irresponsible. The defendant's counsel had requested the court to charge, 'that the plaintiff cannot recover for any amount beyond that which remained after deducting the Parks note.' The request being refused, an exception was taken. The only opinion in the case is that of Judge Lott, who says: 'The surrender of those notes, under the decision in *Brown v. Leavitt*, 31 N. Y. 113, and the cases there cited, made the bank a holder for value, and entitled it to recover the full amount claimed in those actions, without deducting the amount of the note of Parks.' The question in *Brown v. Leavitt* was simply whether the surrender and delivery up to the debtor of an existing note, and receiving another in payment of it, constituted a valuable consideration within the meaning of the rule which protects a *bona fide* purchaser for value against defenses existing between prior parties; and neither in that case, nor in any one of the cases there cited, was any question presented, like that in the case at bar; unless it be in the cases of *Stalker v. McDonald* and *Young v. Lee*, in which cases the doctrine laid down was, as we have seen, directly contrary to the position of the appellant here. I have looked into the original points and case on the argument in the court of appeals in *The Park Bank v. Watson*, and find that it was claimed there by the plaintiff that, notwithstanding the evidence touching the irresponsibility of Parks, the maker of one of the notes surrendered, his note was nevertheless of value, and would probably have been paid. It cannot

WANT OR FAILURE OF CONSIDERATION.—It is essential to the validity of every contract that it be based on a sufficient consideration. Notes and bills are not exceptions; some consideration there must be;¹ but they import a consideration; that is, in the absence of any express admission, a consideration is presumed by law to exist, not only between the original parties, as maker and payee of the note, and drawer and acceptor of a bill, but also between other and subsequent parties. In suing upon these commercial contracts, no special averment or proof of consideration is necessary;² the averment and proof of a contract

be affirmed that a particular note of a party, shown to be of the character, and in the position such as that of Parks, is wholly valueless. Now the request of the counsel for the defendant in that case was, that the judge charge that the entire amount of the Parks note must be deducted from any recovery. Upon well settled practice, this request was too broad, as the note of Parks had some value, and an exception to the refusal to charge as requested was therefore unavailable; and the remark of Justice Lott, which has been quoted, so far as it is supposed to countenance the idea that the holder of negotiable paper, in good faith, for value, to which there is a defense as against the party from whom the holder received it, may recover the full face of the paper, without regard to the amount he has paid for it, if not inadvertent, was at least unnecessary to the decision, and wholly unsupported by the authorities on which it was supposed to have been placed." *Gilbert v. Duncan*, 5 Dutcher, 133; *Ingall v. Lee*, 9 Barb. 647; *Alaire v. Harts-horn*, 1 Zabriskie, 665; *Robins v. Maidstone*, 4 Q. B. 811; *Williams v. Smith*, 2 Hill, 301; *Valette v. Mason*, *Smith (Ind.)*, 84; *Cook v. Cockrill*, 1 Stew. 475. See *Grand Rapids, etc. R. R. Co. v. Sanders*, 17 Hun, 553.

¹ *Fowler v. Shearer*, 7 Mass. 14, 22; *Jennison v. Stone*, 33 Mich. 99.

² In *Bourne v. Ward*, 51 Me. 191, it was held that negotiable notes, when they have passed into the hands of indorsees, in the usual course of trade, enjoy the privilege of having a consideration presumed. But notes not negotiable, and negotiable notes while in the hands of the payee, enjoy no such privilege. *Bristol v. Warner*, 19 Conn. 7; *Delano v. Bartlett*, 6 Cush. 364; *Burnham v. Allen*, 1 Gray, 496. If it contain the words "value received," they are *prima facie* evidence of consideration. See *Holliday v. Atkinson*, 5 B. & C. 501; *Bristol v. Warner*, 19 Conn. 7. *Richardson v. Comstock*, 21 Ark. 69, held that a note in the hands of the payee is *prima facie* evidence of consideration. The words "value received" are in the note. The opinion says, "the note, upon its face, furnishing *prima facie* evidence of consideration, as held by a series of adjudications of this court." *Gage v. Milton*, 1 Ark. 228; *Rankin v. Budgett*, 5 Ark. 346; *Green v. George*, 8 Ark. 133; *Cheny v. Higginbotham*, 10 id. 273; *Dickson v. Burks*, 11 id. 317.

The cases in the 8th and 10th Ark. were cases upon promissory notes—but the notes are not set out,—and whether the words "value

of such nature includes this essential element. But this presumption of consideration is not conclusive between the immediate parties to the contract, nor, indeed, between remote parties; except in favor of a *bona fide* holder, for value.¹

It is not within the object of the writer to discuss, in detail, the law which defines a *bona fide* holder for value; but rather what deductions are authorized where the paper is open to defenses. If there is a total *want* or a total *failure* of consideration, there can be no recovery; the essential basis of a binding contract is then shown to be wanting.² Fraud vitiates a contract; and, at the election of the defrauded party, it may be avoided; but, if not avoided by him, such fraud is only available

received" are in them or not does not appear. The decision seems to proceed on the ground that, as promissory notes, they import a consideration. Story on Prom. Notes, § 181; Chitty on Bills, pp. 78 and 85. Where one consideration of a note has been negated by breach of warranty, there can be no presumption, in the absence of evidence, that there was any other. In such a case the maker is not obliged to prove that there was no other consideration. Aldrich v. Stockwell, 9 Allen, 45.

¹Hoffman v. The Bank of Milwaukee, 12 Wall. 181; Lenheim v. Fay, 27 Mich. 70; Crossley v. Ham, 13 East, 498; Goodman v. Harvey, 4 A. & E. 870; Hanover v. Doane, 12 Wall. 342; Andrews v. Pond, 13 Pet. 65; Skilding v. Warren, 15 John. 270; Fisher v. Leland, 4 Cush. 456; Ryland v. Brown, 2 Head, 270; Norvell v. Hudgins, 4 Munf. 496; Harrisburg Bank v. Meyer, 6 S. & R. 537; Thrall v. Horton, 44 Vt. 386; Lawrence v. Stonington Bank, 6 Conn. 521; Taylor v. Mather, 3 T. R. 83, note; Brown v. Davies, 3 T. R. 80; Ayers v. Hutchins, 4 Mass. 370; Thompson v. Hale, 6 Pick. 259; Boggs v. Lancaster Bank, 7 Watts

& S. 331; Tucker v. Smith, 4 Greenlf. 415; Brown v. Turner, 7 T. R. 630; Conger v. Armstrong, 3 John. Cas. 5; Conroy v. Warner, 3 John. Cas. 259; Amory v. Merryweather, 2 B. & C. 573; Evans v. Kymer, 1 B. & Ad. 528; Kasson v. Smith, 8 Wend. 437; Skilding v. Warren, 15 John. 270; Harrisburg Bank v. Meyer, 6 S. & R. 537; Steers v. Lashley, 6 T. R. 61.

²Warner v. Crouch, 14 Allen, 163; Starr v. Torrey, 22 N. J. 190; Buckles v. Cunningham, 6 S. & M. 358; Clough v. Patrick, 37 Vt. 421; Grant v. Townsend, 2 Hill, 554; Sawyer v. Chambers, 44 Barb. 42; Cragin v. Fowler, 34 Vt. 326; Payne v. Cutler, 13 Wend. 605; French v. Gordon, 10 Kan. 370; O'Neil v. Bacon, 1 Houston (Del.), 215; Morrell v. Aden, 19 Vt. 505; Case v. Gerrish, 15 Pick. 49; Rice v. Goddard, 14 Pick. 293; Dickinson v. Hall, 14 Pick. 217; Joliffe v. Collins, 21 Mo. 338; Smith v. Brooks, 18 Ga. 440; Washburn v. Picot, 3 Dev. 390; Aldrich v. Stockwell, 9 Allen, 45; Tillotson v. Grapes, 4 N. H. 444; Dunbar v. Marden, 13 N. H. 311; Jackson v. Warwick, 7 T. R. 121. See Diefendorff v. Gage, 7 Barb. 18; Fitch v. Redding, 4 Sandf. 130.

as ground for a cross action, or recoupment, which is of the same nature; or as a defense where the fraud has directly caused a want or failure of consideration.¹ A total failure of consideration nullifies a contract equally as a total want of consideration prevents its inception. Accommodation paper is without consideration in the hands of the accommodated parties.² Nor can a note be supported as a gift; for a gift is not consummate and perfect until a delivery of the thing promised; and, until then, the party may revoke his promise.³

If a note or bill be given for property, as purchased, which has no existence, there is no consideration;⁴ and it is the same if property bought is wholly without value.⁵ A note or bill given for the price of a void or worthless patent right is without consideration.⁶ So a contract by note, bill or otherwise, to pay purchase money of land conveyed by a void deed, as when made by a married woman;⁷ or by a valid deed with covenants of warranty, by which no right or title passes.⁸ And where property, either personal or real, is purchased with warranty of title or quality, and it turns out that there is no title in the vendor, or that the property is destitute of the warranted quality and is worthless, and no actual benefit is transferred to the purchaser, the warranties will not constitute a consideration.⁹

¹ Andrews v. Wheaton, 23 Conn. 112; Wright v. Irwin, 33 Mich. 32; Thornton v. Wynn, 12 Wheat. 183; Withers v. Greene, 9 How. (U. S.) 213; Drew v. Towle, 27 N. H. 412; Stone v. Peake, 16 Vt. 213; Clopton v. Elkin, 49 Miss. 95; Nichols v. Hunton, 45 N. H. 470; Southall v. Rigg, 4 Eng. L. & Eq. 366; French v. Gordon, 10 Kan. 370; Morrill v. Aden, 19 Vt. 505; Lewis v. Cosgrave, 2 Taunt. 2. See Carpenter v. Phillips, 2 Houst. (Del.) 524.

² Jackson v. Warwick, 7 T. R. 121; Knight v. Hunt, 5 Bing. 432; Sparrow v. Chisman, 9 B. & C. 241; Thompson v. Chebley, 1 M. & W. 12.

³ Nash v. Brown, Chitty on Bills, *74, note (x); Edw. on Bills & Notes, 307; Fink v. Cox, 18 John. 145;

Easton v. Pratchell, 1 Cromp. M. & R. 798.

⁴ 2 Kent's Com. *468; Hastie v. Couturier, 9 Ex. 102; Barr v. Gibson, 3 M. & W. 390; Strickland v. Turner, 7 Ex. 208; Allen v. Hammond, 11 Pet. 63.

⁵ Shepherd v. Temple, 3 N. H. 455; Ramsey v. Sargent, 21 N. H. 397; Perley v. Balch, 23 Pick. 283; O'Neal v. Bacon, 1 Houst. (Del.) 215.

⁶ Clough v. Patrick, 37 Vt. 421; Joliffe v. Collins, 21 Mo. 338; Dickinson v. Hall, 14 Pick. 217. But see Miller v. Finley, 26 Mich. 249.

⁷ Warner v. Crouch, 14 Allen, 163; Grout v. Townsend, 2 Hill, 554.

⁸ Rice v. Goddard, 14 Pick. 293; Fisher v. Salmon, 1 Cal. 413.

⁹ Rice v. Goddard, 14 Pick. 293; Dickinson v. Hall, 14 id. 217; Al-

Where the maker and payee of a note were owners of land, and the maker took a conveyance of it to sell it on joint account, and gave the note as security for prompt payment of the purchase money when the land should be sold, a defense to the note of a want of consideration was held good until the land was sold.¹ A want of consideration destroys the validity of a contract without regard to the *bona fides* of the transaction; as where the defendant promised as administrator to pay a given sum for value received by one of the heirs of the intestate; or where a debtor pays part of his debt before it is due, and a note is given him instead of a receipt, to show that he is to be allowed interest on the sum paid; or where a note is given in renewal of another which was not founded on any consideration; or where a note is given to a widow for a debt due to her deceased husband's representatives; or where a note is given to the mother of a child that has been beaten to stay a prosecution for the injury; or where a note is given on a mere moral or honorary obligation, not on anything which the law esteems a valuable consideration.² A total failure of consideration occurs where there was a consideration at the inception of the contract and it subsequently becomes wholly nugatory. This may be illustrated by a note or bill given for the purchase money of goods to be subsequently delivered at a stated time, and a failure to deliver the same.³

Where a note was given in consideration of the relation of apprenticeship which the parties supposed was to be created between the maker's son and the payee, but which relation at the time of the trial it appeared never did exist between them, it was held the consideration wholly failed. By the statute of Anne, the duty was laid on the master in consideration of the

drich v. Stockwell, 9 Allen, 45; Shepherd v. Temple, 3 N. H. 455; Mason v. Wait, 5 Ill. 127. See Owings v. Thompson, 4 id. 502; Vincent v. Morrison, 1 id. 227; Lamer-son v. Marvin, 8 Barb. 9; Hoy v. Taliaferro, 8 Sm. & M. 727; Furniss v. Williams, 11 Ill. 229; Clark v. Snelling, 1 Ired. 382; Wilson v. Jordan, 3 Stew. & P. 92.

¹ Marsh v. Bennett, 22 Ill. 313.

² Edwards on Bills, 327; Ten Eyck v. Vanderpool, 8 John. 120; Schoonmaker v. Roosa, 17 John. 300; Crofts v. Beale, 5 Eng. L. & Eq. 408; Slade v. Halstead, 7 Cow. 322; Geiger v. Cook, 3 W. & S. 266; Bryan v. Philpot, 3 Ired. L. 467; Heast v. Sybert, Cheves, 177.

³ Wells v. Hopkins, 5 M. & W. 7.

premium received by him to have the same inserted in the indenture, and that instrument properly stamped. He having failed to perform that duty, and the time for it having expired, the relation was not instituted.¹

PARTIAL WANT OF CONSIDERATION.—Partial want of consideration avoids a note or bill *pro tanto*, where the holder is subject to defenses relating to the consideration; as where a note is given on a settlement of account, and is given by mistake for more than is due;² and where a bill is drawn as to part for value, and as to the remainder for the accommodation of the plaintiff, the recovery will be limited to the consideration of value;³ and it may be stated generally, that where a note or bill is given for several distinct considerations, and one is not a consideration which the law deems valuable, so much of the promise as is founded upon that consideration is void, and there will be a deduction from the amount of the paper of so much as was included for that element of the consideration which is invalid;⁴ and this partial defense is available, although the amounts of the several considerations are not liquidated, and fixed by the parties. In such case, if one of two independent considerations on which a note is founded is one which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned as between the original parties or such as have the same relative rights, and the holder will recover to the extent of the valid consideration, and no further; and the question what amount was founded on one consider-

¹Jackson v. Warwick, 7 T. R. 121.

²Mercer v. Clark, 3 Bibb, 224; Phittiplace v. Sture, 2 John. 442; Forman v. Wright, 11 C. B. 481. See Briscoe v. Kenealy, 8 Mo. App. 76.

³Darnell v. Williams, 2 Stark. 166.

⁴Bates v. Butler, 46 Me. 387; Parish v. Stone, 14 Pick. 198; Collins Iron Co. v. Barkam, 10 Mich. 283; Great Western Ins. Co. v. Rees, 29 Ill. 272; Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id. 213; Wilson v. Forder, 20 Ohio St. 89; Barber v. Back-

house, Peake, 61; Sparrow v. Chrisman, 9 B. & C. 241; Lewis v. Cosgrove, 2 Taunt. 2; Wintle v. Crowther, 1 Ty. & W. 213; Gascoyne v. Smith, McClel. & Y. 338; Stephens v. Wilkinson, 2 B. & Ad. 320; Barber v. Morton, 7 U. C. App. 114; Allaire v. Hartshorne, 21 N. J. L. 665; Payne v. Ladue, 1 Hill, 116. But see Lash v. McCormick, 17 Minn. 403; Walters v. Armstrong, 5 Minn. 448; Leighton v. Grant, 20 Minn. 345; Whitacre v. Culver, 9 Minn. 295.

ation and what on the other, will be settled by the jury upon the evidence.¹

PARTIAL FAILURE OF CONSIDERATION.—A partial failure of consideration is a subject on which there has been much conflict of authority. On principle, there should be no difference between partial failure and partial want of consideration, in respect to

¹ *Parish v. Stone*, 14 Pick. 198; *Loring v. Sumner*, 23 Pick. 98. In *Parish v. Stone*, Shaw, C. J., said: "It seems very clear that want of consideration, either total or partial, may always be shown by way of defense; and that it will bar the action, or reduce the damages from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot, therefore, in such a case, depend upon the state of the evidence, whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended in a great degree to be gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt, and what a gratuity. The rule to be deduced from the cases seems to be this: that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not; there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration, and no further. In the application of this principle, there seems to be no reason why it shall depend upon the state of the evidence, showing that these

different parts can be ascertained by computation; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration, and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor as to the whole note; and the burden is upon the defendant to show to what extent the note is without consideration. Suppose a father proposes, upon his son going into business, to aid him by an advance of several thousand dollars, and for that purpose gratuitously offers him his note for that sum; but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note, the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it by the payee against the maker, might not the defendant show the want of consideration by way of defense *pro tanto*? And yet the amount must be settled by a jury; the evidence of the original agreement not distinguishing between what was payment and what was gratuity." *Pacific Iron Works v. Newhall*, 34 Conn. 67.

the mode of arriving at certainty of amount to be deducted on that account. Wherever the amount is provable for the purpose of a defense *pro tanto* on the ground of a partial want of consideration, it ought to be provable for a like defense if the consideration partially fails.

In an English case, decided in 1824, it was declared that a partial failure of the consideration of a promissory note constitutes no ground of defense, if the *quantum* to be deducted on that account is not of definite computation, but of unliquidated damages.¹ It was a case in which, according to the report, the real ground of complaint was inadequacy, and not part failure of consideration. A note was given for 20*l.* for the plaintiffs' disclosing to the defendant an improvement in certain machinery, which turned out to be *less beneficial* than was anticipated by the parties. The improvement was not entirely useless; and therefore the sum agreed to be paid for the disclosure, although disproportionate to the benefit received, was not without consideration. In the absence of any warranty, or undertaking of the promisee in respect to the extent to which the improvement should be beneficial, the promisor bought the disclosure for such benefit, more or less, as he could derive from it; if small, he was obliged to be content; no element he had contracted for and had a right to exact from the seller was wanting; if large, even beyond expectation, the seller was obliged to be content; he reserved no right to require more to be paid.²

There is an important difference between a want or failure of consideration and its inadequacy. If the consideration is of value, it is sufficient, although it is not adequate in the sense of being equal. A consideration is not deficient merely because the undertaking based upon it is of very much greater value. No defense of want or failure of consideration can be grounded on any such disparity. There is no want of consideration where the promisor has received all he bargained for, and it is of some value; nor is there, under such conditions, a failure of consideration. It is enough that he gets all that he is entitled to exact from the other party. A party entering into a contract is admonished by the law that it fixes no values, except of

¹ Day v. Nix, 9 Moore, 159.

² See Agra v. Leighton, L. R. 2 Ex. 56.

money; that the amount which may be recovered from him on his express promise is not the absolute value of what he receives, as evidence might establish it, but the sum which he agrees, on his own judgment, and with a view to his own purposes, to pay for it. A purchaser is subject to the rule of *caveat emptor*; and although he may suppose that the subject of purchase has qualities of which it is in fact destitute, and for that reason engages to pay a sum for it greatly in excess of the true value, he is entitled to no redress on that account; and he can ask for no abatement of the requirements of his contract in any such case which is unaffected by fraud or warranty.

In modern times, the necessity to bring cross actions has been abridged by the practice and legislation increasing the scope of defenses as to matters connected with the consideration, not only of commercial paper, but of all other contracts.

By the early common law, even in an action on a *quantum meruit* for work done, there was, as late as the beginning of the present century, a hesitation of the English courts to allow the defendant to prove, in reduction of damages, that the work was done in an improper and insufficient manner; it was doubted whether a cross action should not be brought.¹ In an action of assumpsit for rebuilding the front of a house, the defendant showed, under a plea of non-assumpsit, that the work was badly done. There was a conference of the English judges in respect to allowing such defenses. Its allowance was treated as a departure from the previous practice.² It was resolved that the correct rule was, that if there has been no beneficial service, there should be no pay; but if some benefit has been derived, though not to the extent expected, this should go to the amount of the plaintiff's demand.³ Lord Ellenborough said: "Where a specific sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise if evidence be admitted to show the work and materials provided were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specified sum and the work done. But where the plaintiff comes

¹ Basten v. Butler, 7 East, 479.

³ Ibid.

² Farnsworth v. Garrard, 1 Camp.

into court upon a *quantum meruit*, he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into, even without notice.”¹ And it was added by another member of the court, that “if even a specific sum had been agreed to be paid, and notice given, then the defendant should be let into the defense. For after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do, the doing of which would be the consideration of the defendant’s promise to pay, and the foundation on which his claims to the price stipulated for would rest; and, therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly.”² Thus the practice came into vogue of making defenses for defect of consideration to actions for fixed or agreed sums. But this was not permitted in England, where a note or bill had been given. It was held there pretty uniformly that a partial failure of consideration was no defense in such cases.³ The giving of such paper was treated, in respect to such a defense, as the payment of so much cash.⁴ This distinction has not been recognized by the American courts. Where the action is between the original parties or others holding the paper subject to defenses, a partial failure of consideration can be set up as a partial defense; in the latter case it is available to the same extent as though the action were brought by the original party, and founded on the original contract or consideration.⁵

Many American cases hold that a partial failure of consideration is not available; that the defendant must resort to his cross action.⁶ Occasionally, a partial failure is allowed if the amount

¹ Basten v. Butler, *supra*.

² *Id.* per Lawrence, J.

³ Morgan v. Richardson, 1 Camp. 40; Tye v. Gwynne, 2 Camp. 346; Trickey v. Larne, 6 M. & W. 278; Sully v. Frear, 10 Exch. 535; Georgian Bay Lumber Co. v. Thompson, 35 Upper Canada, Q. B. 64; Gascoyne v. Smith, McC. & Y. 338. But

see De Sewhanberg v. Buchanan, 5 C. & P. 343.

⁴ Warwick v. Nairn, 10 Exch. 762; Jones v. Jones, 6 M. & W. 84.

⁵ Wykoff v. Runyon, 33 N. J. 107; Batterman v. Pierce, 3 Hill, 171; Smith v. Smith, 30 Vt. 139.

⁶ Washburn v. Picot, 3 Dev. L. 390; Russell v. Splater, 47 Vt. 273;

to be deducted on that account is liquidated, and may be ascertained by mere computation. In a New Hampshire case a note was given for seventeen articles of machinery, with no separate valuation; five of the articles were at the time under a valid attachment against the vendor, and were afterwards sold under execution in the attachment suit. In an action on the note an abatement was claimed by the defendant for part failure of consideration, for loss of the five articles. The court say: "To this extent the consideration has failed; and had there been a specific value fixed to the articles when the defendant purchased them, the amount could now be deducted, and allowed in this suit. But the value was not fixed. The whole seventeen articles were sold for \$1,200, and whether these five were worth five-seventeenths of that sum, or one-half or one-third, or what they were worth, is a matter entirely unliquidated; and upon the authorities cited, the ruling of the court, excluding the defense, was correct."¹ This strict rule has been changed in that state and in several others by statute;² and in many others it has been departed from upon general principles. In Maine, an action was brought on a note given for the good will and practice of a physician; the defense was, that after a certain period, subsequent to the sale, the vendor resumed practice in the same town. It was held that by such resumption of practice the vendor deprived the defendant of a part of the consideration of the note, and although the injury was unliquidated, it might be proved in mitigation of damages. Wells, J., said: "If there be a sale of two chattels for a gross sum and a note given for the price, and one of the chattels is not the property of the vendor, and a partial want of consideration may be shown, why should not the same defense be allowed if both of the chattels were the property of the vendor, and the title passed to the vendee, but the vendor destroyed one of them before deliv-

Berlin v. Schermerhorn, 21 Vt. 289;
Jordan v. Jordan, Dud. (Ga.) 181;
Hinton v. Scott, id. 245; Scudder v.
Andrews, 2 McLean, 464; Stone v.
Peake, 16 Vt. 213; Carpenter v.
Phillips, 2 Houst. (Del.) 524; Thrall
v. Horton, 44 Vt. 386; McClain v.
Williams, 8 Yerg. 230; Merrill v.

Aden, 19 Vt. 505; Craigin v. Fowler,
34 Vt. 326; Hackett v. Schud, 3
Bush. 353.

¹ Riddle v. Gage, 37 N. H. 519;
Drew v. Towle, 27 N. H. 412; Kirk-
patrick v. Muirhead, 16 Pa. St. 117.
See Dyer v. Homer, 22 Pick. 253.

² Clough v. Baker, 48 N. H. 254.

ery? In one case there is a want of consideration, at the time when the contract is made, to the extent of the value of one of the chattels; in the other a failure of it, to the same extent, caused by the misconduct of the vendor. There does not appear to be any good reason why the maker of the note might not defend on one ground as well as the other."¹ In Minnesota, it has been held that a partial failure of consideration, though unliquidated, is available as a defense to the extent that the consideration has failed.²

A partial failure of consideration of a note given for the price of property sold, caused by breach of warranty, fraudulent misrepresentations, or fraudulent overcharge, may be shown in mitigation of damages.³ A covinous note given to defraud creditors cannot be avoided by the maker for the fraud; it may be enforced against him; the statute declares the invalidity of the note only as to the party or parties whose right, debt

¹Herbert v. Ford, 29 Me. 546. The learned judge continued: "Accordingly it was held in Dyer v. Homer, 22 Pick. 253, where there was a sale of chattels, which was considered valid between the parties, but not so as to attaching creditors, and some of the chattels were taken and held by an attaching creditor, that the maker of the note, given for them, might prove the failure of the consideration in an action on the note.

. . . If Clark, by resuming his practice, has prevented the defendant from enjoying the entire benefit of the contract, he ought not, through the plaintiff (the vendor's agent, to whom the note was payable), to be permitted to recover compensation for that which he has agreed the defendant shall enjoy, when, by his own interference, the defendant has been deprived of it. Clark is responsible in damages if there has been a breach of his contract; but it does not appear from the current of authorities, that the defendant is limited to that remedy

alone. The consideration of the contract was the good will of the practice, and so far as that has been taken away by Clark, there is manifestly a failure of it. The tendency of decisions in this country has been to allow a broader latitude of defense than was permitted by the rigid rules of the common law, to bills of exchange and promissory notes, where the justice of the case required it, and a circuity of action could be avoided."

A similar decision was made in Stacey v. Kemp, 97 Mass. 166, under the name of reducing the damages. See Hodgkins v. Moulton, 100 Mass. 309.

²Bisbee v. Torinas, 26 Minn. 165.

³Burton v. Stewart, 3 Wend. 236; Harrington v. Stratton, 22 Pick. 510; Coburn v. Ware, 30 Me. 292; Hammatt v. Emerson, 27 id. 308; Haycock v. Rand, 5 Cush. 26; Welch v. Hoyt, 24 Ill. 117; Lewis v. Cosgrove, 2 Taunt. 2.

or duty is attempted to be avoided.¹ So a partial failure may be given in evidence to reduce damages where part of the articles for which the note was given were unskilfully manufactured, and not in compliance with the contract;² and to the extent of the depreciation, where a note is given for depreciated currency loaned at the nominal amount; and where a note is payable to a bank, and its depreciated bills have been duly tendered in payment.³ So a note given for prospective work which fails in part to be done, by reason of the death of the payee, is subject to a deduction proportioned to the amount of work left unperformed.⁴ But it has been held that the consideration of a premium note to an insurance company cannot be impeached by showing that the insurance company became insolvent during the period of the insurance, for the rights of other persons were involved.⁵ And in other cases the amount of the failure of consideration may be of so uncertain a nature as to be incapable of any estimate, even upon testimony; and therefore the court will not make any inquiry concerning it.⁶ But where a purchaser of personal property transferred and indorsed a note of a third person in payment, amounting to more than the purchase price, and received the vendor's note for the excess, on which he brought suit; it was held that such vendor, to establish entire failure of consideration, might show that the maker of the indorsed note was insolvent, so that a suit thereon would be unavailing; and he need not release any part of the plaintiff's responsibility as indorser, for the plaintiff's liability on his indorsement would be limited to the amount received as consideration therefor.⁷

A want or failure of consideration in a strict sense is a mere negation; as a defense, it rests on the idea and principle of there being no valid contract; that it was wholly or partially

¹ *Carpenter v. McClure*, 39 Vt. 9.

² *Spalding v. Vandercook*, 2 Wend. 431. See *Payne v. Cutler*, 13 id. 605.

³ *Commercial & Railroad Bank v. Atherton*, 1 Sm. & M. 641; *Scott v. Hamblin*, 3 id. 285.

⁴ *Clendinen v. Black*, 2 Bai. 488. See *Gleason v. Clark*, 9 Cow. 57. Evi-

dence of negligence in the performance of professional services may be given in evidence under notice to reduce the amount.

⁵ *Sterling v. Mercantile Insurance Co.* 32 Pa. St. 75.

⁶ *Pulsifer v. Hotchkiss*, 12 Conn. 234.

⁷ *Litchfield v. Allen*, 7 Ala. 779.

void from the beginning, or afterwards wholly or partially ceased to be binding, because lacking or losing this indispensable support. The distinction is very obvious between a full or partial defense based on the theory that the plaintiff's demand in whole or in part never had any valid existence; and a defense which concedes the existence of the plaintiff's demand, and succeeds by canceling or reducing that demand by setting off a counter-claim. The latter mode of defense, under the name of *recoupment*, has been considered.¹

To the extent that there is either a want or failure of consideration, as distinguished from mere inadequacy, the law in some form affords relief. If *wanting* as to a part of the contract, as we have seen, the contract is void, *pro tanto*, in its inception; there can be no recovery for such part, whether it is apportionable by mere computation from data in the contract, or must be ascertained by a jury upon testimony; and whether the action is upon the original contract, or upon a note or bill. So far the English and American authorities agree. A partial failure of consideration, generally, if not invariably, admits of another remedy by cross action. Such failure may arise from accident, and afford ground for rescission of the entire contract; as where some element or incident stipulated for in an executory purchase, and which is the leading inducement thereto, has ceased to exist, before complete performance. A subsequent completion of the purchase would be a waiver of the objection. But if the value of the subject matter of a purchase be impaired before delivery, by the tortious act or the neglect of duty of the vendor, recovery may be had therefor in a separate action; or it may be the ground of an abatement of the purchase price. A partial failure of consideration may also arise from the default of the plaintiff in performance of some concurrent or precedent agreement; or it may result from some act or default of the plaintiff, equivalent to a breach of some agreement subsequently to be performed, and which was the consideration of the promise sued on. In the case of mutual agreements, performance on one side is the consideration of the performance on the other, where they are concurrent or depend-

¹See vol. 1, p. 261.

ent. If one party fails to perform his part, he cannot require performance on the other. A declaration in an action upon such a contract which does not aver performance of precedent conditions, or a readiness to perform concurrent stipulations, fails to state a cause of action; it does not show that the consideration of the defendant's promise has been kept good.¹ If a note be sued on, the consideration of which was a contract of the payee to perform precedent or concurrent stipulations, and they have not been performed, and the plaintiff in respect to them is in default, these facts may be alleged as a defense. Such a defense is a failure of consideration, and may be total or partial.² It does not rest on rescission of the contract; nor is it recoupment.³

In the case of independent stipulations the contract has a valid inception, and is sustained on the principle that one stipulation is a consideration for another. Where the contract provides for some act to be done on one side in return for some subsequent act to be done on the other, the doing of the first act is a condition precedent, and the agreement to perform it is independent, and the consideration is the promise of the other party to perform the subsequent act. The consideration of the promise to perform such subsequent act is the performance, not the promise to perform the precedent condition. Where a promise is the consideration, if it is in binding form and made by a competent party, there is no want of consideration; and if its obligation is not afterwards impaired, there is no failure of consideration. By the strict common law, a party bound by independent stipulations, those based on a promise as a consideration as distinguished from its performance, is bound to perform according to the tenor of his undertaking; that undertaking is enforced for all that it imports, without regard to the

¹ Hall v. Perkins, 5 Ill. 548; Buckmaster v. Grundy, 2 id. 310; Washington v. Ogden, 1 Black, 450; Lawrence v. Griswold, 30 Mich. 410; Rogers v. Cody, 8 Cal. 324; Dicken v. Morgan, 54 Iowa, 684.

² Tyler v. Young, 3 Ill. 444; Goodwin v. Nickerson, 51 Cal. 166;

Wells v. Hopkins, 5 M. & W. 7; Lawrence v. Griswold, 30 Mich. 410; Coppock v. Burkhart, 4 Blackf. 220; Rogers v. Cody, 8 Cal. 324. But see Waterhouse v. Kendall, 11 Cush. 128.

³ Thompson v. Richards, 14 Mich. 172.

ability of the other party subsequently to perform his promise which was the consideration.¹

Where A sold his business as a dentist in a specified place to B, who gave his note for the agreed price, receiving from A a bond conditioned that he would not practice as a dentist at that place, and a suit was brought on the note after a part had been paid, it was held that a defense of a part failure of consideration, by reason of A failing to perform the condition of the bond, was inadmissible. The court say, "a part of this consideration he received at the time; all that could be received or enjoyed, and for what was to be done in the future, he received the contract. . . . as contained in and secured by said bond. This was evidently the consideration he received for which he agreed to pay the \$3,000, for which the note was given, and all this consideration he received; he got all that he bargained for. But taking it as stated in the pleas, that the bond was the consideration for the note, then there was no want of consideration, for the plea alleges that the bond was that consideration, and that it was received according to the agreement of the parties. There was then no want of consideration, either total or partial. Has there been any *failure* of this consideration? Has the bond which was the sole consideration for this note failed in any way? Is it not as valid a security now as at first? Has it proved to be of no binding force or effect? Has it become a void instrument since it was made? If it had been void from the beginning, then there might have been a *want* of consideration. If it has become void since it was made, so as to be no longer of any force or effect as a security, then the consideration has *failed*. But it is not claimed that such is the fact. The bond, which is admitted to have been the consideration for which the defendant . . . agreed to pay \$3,000, and which was received just according to agreement, and which was a good and sufficient consideration for such promise at the time, remains in full force and effect; just as valid and binding now as it was the day it was given. If it was a sufficient consideration then, wherein has it failed to

¹ Foster v. Jared, 12 Ill. 451; Read v. Cummings, 2 Greenlf. 82.

be so now?"¹ But it was formerly the peculiar function of equity to mitigate the severity of this rule of law where the real consideration, which was the thing promised, failed.² The principles of equity on this subject have, however, been largely incorporated into the common law, although not to the same extent in all jurisdictions. Under various circumstances where parties have bound themselves to conditions precedent, or by independent stipulations, they have been permitted to avoid this contract at law, as they could in equity, by showing that the promise, which was the technical consideration, had ceased to be of any value, because, by some act or default of the promisor, he was unable to perform his promise. This doctrine is pointedly stated by Richardson, C. J., in a case which arose in New Hampshire: "When a promise of the payee is the consideration of a note, and that promise fails altogether, so that the maker of the note loses all the advantage he might have expected to derive from it, and nothing is left to him but a mere right of action for the breach of that promise, we are of opinion that he may waive that right of action, and treat the whole agreement as a nullity, if he so choose, and thus avoid the note. In such a case, the substantial inducement which led

¹ *Clough v. Baker*, 48 N. H. 254. Sargent, J., further said: "The distinction between a failure of consideration and such a failure to perform on one side as gives the other party an election to rescind the whole contract, or to enforce it, has not always been made or clearly stated, and some confusion may be found in the authorities. *Tillotson v. Grapes*, 4 N. H. 444, is a case in which such a failure to perform his contract on one side as would authorize the other side to rescind the whole contract, is improperly spoken of as a failure of consideration. 2 *Smith's L. Cases*, *9 and 10, in note to *Cutler v. Powell*, and cases cited; *Dodge v. McClintock*, 47 N. H. 383, and cases cited; *Wallace v. Company*, 44 N. H. 531; *Campbell v.*

Jones, 6 T. R. 570." By a written agreement between A and B, the former agreed that B should have leave to cut timber and wood on his land, and B agreed that A should have leave to flow his land by a dam to a certain extent. They were treated as independent agreements, and it was considered that either might not only have his action for a breach of the contract in his favor, without regard to his performance of his contract to the other party, but that either in such a case might revoke his license at his option, whether the other party did or not, provided the license is on other grounds revocable. *Dodge v. McClintock*, 47 N. H. 383.

² *Morgan v. Smith*, 11 Ill. 194.

the maker of the note to enter into the contract having totally failed, justice requires that he should not be held to perform the contract on his part against his will. He may, if he please, perform the contract on his part, and resort to an action for the breach of the contract on the other side; but he is not compelled to do this. These principles we consider as well settled by authority."¹

In a case which arose in Illinois, a note was given for the purchase money of land; it was payable a month earlier than the contract required the vendor to make a conveyance. The action upon the note, however, was delayed until after the time appointed for conveyance. The vendor had no title to the land when the contract was made, and he had none afterwards when the day arrived for making the conveyance. Although payment of the purchase money was a condition precedent, yet as the vendor had no power to convey, and had neglected to obtain title, the consideration of the note was deemed to have entirely failed. Scates, J., says: "I should by no means regard it as want or failure of consideration, that the covenantor had no title at the time of making the covenant, or at the time of the performance of a condition precedent, by the other party, for peradventure he may obtain the title by or before the day of conveyance. The difficulty is in the proof, and not in the applicability of the defense. The old doctrine, holding a promise to be a consideration of a promise, should only be applied where no other consideration can be found available to sustain the agreement of the parties. Here we find another, a better, and a surer one. We reach the same goal by a shorter route. If the parties are unable to sustain their contract by the performance of the consideration, we allow them to rescind it at once, and without delay, and thus save the circuity of action and costs, occasioned by allowing the plaintiff to recover the money on the note, and the defendant to recover it back upon the breach of covenant. By the delay in bringing this action, the defendants are enabled to prove their defense, by showing the inability of the obligors to assure the estate; and it seems to me to savor more of technicality, harshness, nay, injustice, than of reason or

¹ *Tillotson v. Grapes*, 4 N. H. 444.

equity, to say to them, because you agreed to pay a month before you were entitled to a conveyance, that you must now pay the money, and sue upon the covenant, although you are ready and able to show that the covenantors are not able to convey the estate which they agreed to convey."¹ In another case in that state, a plea of failure of consideration of a note, averred that the payee was to plant a hedge for the maker which should become a complete protection against stock, in from three to five years; that the note in question was given for moneys payable for such hedge at the time of the planting; that the plants set out were winter-killed and useless, never having grown; and that it was then out of the power of the payee to make the hedge according to the agreement. Although the money for which the note was given was due at the time of planting the hedge, and the note made payable one day after date, and the hedge was not to be completed until "from three to five years," it was held that the consideration had failed, a demurrer to the plea being taken as an admission of the statement that it was

¹Gregory v. Scott, 5 Ill. 392. See Lull v. Stone, 37 Ill. 224; Davis v. McVickers, 11 Ill. 327; Owings v. Thompson, 4 Ill. 502; Deal v. Dodge, 26 Ill. 458; Tyler v. Young, 3 Ill. 444. The statute of Illinois referred to in the foregoing cases does not define a failure of consideration. It provides that: "In any action commenced, or which may hereafter be commenced in any court of law in this state, upon any note, bond, bill, or other instrument in writing for the payment of money, or property, or the performance of covenants or conditions, by the obligee or payee thereof, if such note, bond, bill, or instrument in writing was entered into without a good and valuable consideration; or, if the consideration upon which said note, bond, bill, or instrument in writing was made or entered into, has wholly or in part failed, it shall be lawful for the defendant or defendants, etc., to

plead such want of consideration, or that the consideration has wholly or in part failed, etc.; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case." (Scates' Comp. ch. 73, p. 292.) Under this statute, it was held that in an action upon a promissory note given for the purchase money of land, deeded with a covenant against incumbrances, money paid to extinguish an incumbrance should be deducted. Breese, J., said: "A part of the consideration of the note sued on was, that the land sold was free from incumbrance. . . . To the extent, then, of this incumbrance, there was a failure of consideration. Morgan v. Smith, 11 Ill. 199; Whisler v. Hicks, 5 Blackf. 100; Smith v. Ackerman, id. 541; Buell v. Tate, 7 id. 55; Pomeroy v. Burnett, 8 Blackf. 142."

then out of the power of the payee to perform the agreement within the stipulated time.¹

The defense of a failure of consideration in such cases rests on a principle of a rescission of the contract. The defendant who has relieved himself from the performance of a condition precedent or any independent stipulation, on the ground that the promise which was its consideration has altogether failed, cannot afterwards claim damages for such failure of consideration. He has not himself performed, but has been absolved from furnishing the consideration on his part. A sale fills the definition of a valid contract, where there is delivered or sold at a given price a tangible property, or existing subject of any kind, with warranty, and which must possess value if the warranty be true. The contract for the purchase money is a valid consideration on one side, and the undertaking which the warranty imports is a consideration on the other. The warranty of title against defect, or of qualities, is a contract for the present existence of facts. The acceptance of the property so warranted is no admission of the truth of the warranty; but where delivery and payment are to be simultaneous acts, the warranty is generally relied on as the consideration for the price agreed to be paid. The money is parted with on the faith of the warranties — that is, that they are true, not that the purchaser will have only his remedy for damages. Such title as the vendor has is at once vested in the purchaser, and the property is taken absolutely. If the warranties are not true, they are broken at the time of the sale, but the fact is then undecided; they are to be verified or shown to be false by some future test. The same may be said of a sale where a note is given for the price payable at a future day. Payment of the price is no legal waiver of the warranty; though it may have some weight as an evidentiary fact to negative the breach of warranty. If, however, before the price is paid upon an executed sale, the fact can be established that the warranty was untrue, by the later and better authorities it may be shown either as an unliquidated

¹ Edwards v. Pyle, 23 Ill. 354; Morgan v. Smith, 11 Ill. 194; Schuchmann v. Knoebel, 27 Ill. 175; Tillotson v. Grapes, 4 N. H. 444; Litch-

field v. Allen, 7 Ala. 779; Stone v. Fowle, 22 Pick. 166. But see Read v. Cummings, 2 Greenlf. 82; Thompson v. Warren, 5 Cold. 644.

partial failure of consideration, or as a cross claim, the damages upon which may be set off by recoupment. In England, where the action is brought on the original contract, fraud or breach of warranty in a sale, or failure of the plaintiff to perform his part of the agreement, may also be proved in reduction of damages. The sum to be recovered for the price of the article may be reduced by so much as the article is diminished in value by reason of the fraud or non-compliance with the warranty.¹

WHERE PART OF THE CONSIDERATION IS FRAUDULENT OR ILLEGAL.—Fraud is a private wrong, and any entire contract into which it enters may be avoided *in toto* by the party against whom it was practiced.²

If not avoided for the fraud, and the injury therefrom only goes to part of the consideration, the note may be avoided *pro tanto*, as for partial failure of consideration.³ If the maker would repudiate the contract entirely for the fraud, he must return the consideration, unless it is wholly without value;⁴ but without doing this he may have a deduction to the extent that the subject matter is diminished in value by reason of the fraud, wherever a part failure of consideration is allowed as a defense.⁵ But in England, where partial failure of consideration is not allowed as a defense to a note, it was held no defense in an action by the indorser against the acceptor, that the latter had been imposed on in respect to the contract by the drawer, on account of which the acceptance was given, and that the plaintiff was privy to such imposition, where the acceptor did not wholly repudiate the transaction on discovering the imposition, but still retained possession of the premises under such

¹ Lewis v. Cosgrove, 2 Taunt. 2; Street v. Blay, 2 B. & Ad. 456, as explained in Mondel v. Steel, 8 M. & W. 858, 870.

² Coburn v. Haley, 57 Me. 346; Wyman v. Heald, 17 Me. 329; Robinson v. Heard, 15 Me. 296; Lewis v. Cosgrove, 2 Taunt. 2; Solomon v. Turner, 1 Stark. 51; Nicewanger v. Bevard, 17 Ind. 621; Rose v. Wallace, 11 Ind. 112; Davis v. Jackson, 22 Ind. 233; Rodman v. Williams, 4 Blackf.

70; Cowger v. Gordon, id. 110; James v. Lawrenceburgh Ins. Co. 6 Blackf. 525; Doughty v. Savage, 28 Conn. 146.

³ Bischof v. Lucas, 6 Ind. 26; Stevens v. McIntire, 14 Me. 14.

⁴ See Reeves v. Kelly, 30 Mich. 132.

⁵ Bischof v. Lucas, supra; Coburn v. Ware, 30 Me. 202; Hammatt v. Emerson, 27 Me. 308. See Sternbury v. Bowman, 103 Mass. 325.

contract, as the consideration had not altogether failed, so as to render the bill altogether void.¹

Where a note is given for several distinct items or considerations, one of which is discovered by the maker afterwards to be fraudulent; or where one item not chargeable to him is stealthily included in the note without his knowledge, the note is not wholly void or voidable, but only to the extent of the fraudulent item.²

In a case in Ohio,³ a member of a firm after dissolution, without authority from his co-partners, renewed firm notes by giving a new note in the firm name. The new note, without any intent to defraud, was made to bear interest at ten per cent., and to include the individual note of one of the partners. The defendant, a member of the firm, supposing the new note was simply a renewal of the firm notes at six per cent., promised to pay it. It was held that such new note was binding on the defendant for the amount of the firm note surrendered on the renewal, with simple interest from that time.⁴ So, in a Mississippi case, it was stated in a plea to an action upon a note against a surety, that he and another, before a sale by administrators, informed them that they would become the sureties of one Kendrick for any amount of property he might buy at the sale. He purchased to the amount of \$1,138.45. Afterwards, and before the execution of the note in suit, Kendrick became indebted to the administrators otherwise than for property bought at such sale, in the further sum of \$400. The administrators included this sum also in the note, and presented it, signed by Kendrick, to the defendant, and fraudulently and knowingly held the same out to him as for that sole consideration. The defendant being misled, and supposing that the note embraced only the amount of K's purchase at the sale, ignorantly signed it. It was held that the note was

¹ *Archer v. Bamford*, 3 Stark. 175; 1 C. & P. 64. See *Solomon v. Turner*, 1 Stark. 51. But if the action were brought on the original contract for the price, the rule laid down in *De Sewhanberg v. Buchanan*, 5 C. & P. 343, would be applied. *Lorni v. Tucker*, 4 C. & P. 15.

² *Griffiths v. Parry*, 16 Wis. 218; *Haycock v. Rand*, 5 Cush. 26; *Deering v. Chapman*, 22 Me. 48; *Brown v. North*, 21 Mo. 528; *Wade v. Scott*, 7 id. 509; *Andrews v. Wheaton*, 23 Conn. 112.

³ *Wilson v. Forder*, 20 Ohio St. 89.

⁴ See *Gamble v. Grimes*, 2 Ind. 392.

not voidable *in toto*, but only to the amount of the excess.¹ Where the fraud, however, was committed in procuring the execution of the note, as by misreading it to an illiterate person, or substituting another for one read, the note is wholly voidable.²

Where part of the consideration of a note is illegal, no apportionment can be made; the whole note is void. The principle that no court shall aid men who found their cause of action upon illegal acts, is not only well settled, but a most salutary principle. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice. It is fit and proper that courts should refuse their aid to those who seek to obtain the fruits of an unlawful bargain.³ Thus, if a note be given for the price of articles sold, and a sale of a part of them was unlawful, the note is not valid for any part.⁴ If part of the consideration of a note be an agreement to discontinue a criminal prosecution, or to refrain from commencing one;⁵ or to do an act which would be a violation of official duty;⁶ or to indemnify against any unlawful act, as where a premium is to be given for insurance on a cargo, the exportation of a part of which is prohibited by law,⁷ the note is wholly void; being an illegal contract, it is not divisible.⁸

¹ Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id. 213.

² Stacy v. Ross, 27 Tex. 3; Griffiths v. Kellogg, 39 Wis. 290.

³ Roby v. West, 4 N. H. 285; Booth v. Hodgson, 6 T. R. 405; Card v. Hope, 2 B. & C. 661; Holland v. Hall, 1 B. & Ald. 53; Shaw v. Spooner, 9 N. H. 197; Clark v. Ricker, 14 N. H. 44; Brigham v. Potter, 14 Gray, 522; Sternburg v. Bowman, 103 Mass. 325.

⁴ Carlton v. Bailey, 27 N. H. 230; Kidder v. Blake, 45 N. H. 530; Carlton v. Whitcher, 5 N. H. 196; Coburn v. Odell, 30 N. H. 540; Deering v. Chapman, 22 Me. 488; Bliss v. Brainard, 41 N. H. 261; Greenough v. Balch, 7 Greenlf. 461; Hanauer v. Doane, 12 Wall. 342; Gray v. Hook, 4 Comst. 449; Gammon v. Plaisted,

51 N. H. 444; Roby v. West, supra; Perkins v. Cummings, 2 Gray, 258; Braitch v. Guelick, 37 Iowa, 212; Gaitskill v. Greathead, 1 Dow. & Ry. 359; Scott v. Gilmore, 3 Taunt. 226; Snyder v. Willey, 33 Mich. 495; Trist v. Child, 21 Wall. 441.

⁵ Shaw v. Spooner, 9 N. H. 199; Hinds v. Chamberlin, 6 N. H. 225.

⁶ Waite v. Jones, 1 Bing. N. C. 656.

⁷ Parkin v. Dick, 11 East, 502.

⁸ Widoe v. Webb, 20 Ohio St. 431. Where, however, an entire stock of goods is sold at one and the same time, but each article for a separate and distinct agreed value, the contract of sale is not to be regarded as entire and indivisible; and if the sale of some of the articles be prohibited by law, the illegality will not render the sale of the other

In a case in Ohio,¹ Scott, C. J., said: "The concurrent doctrine of the text-books on the subject of contracts is, that if one of two considerations of a promise be *void* merely, the other will support the promise; but, that if one of two consid-

articles illegal also. *Carleton v. Woods*, 28 N. H. 290. The action was brought upon notes given for the whole purchase, and also for goods sold and delivered. The promise embraced in the notes was held entire, and part of the consideration being illegal, the notes were void; but it was held otherwise as to counts for goods sold and delivered.

Wood, J.: "The various articles sold may well be regarded as sold separately, each article constituting the consideration for the promise to pay the price agreed for it. By the contract, each article was separately valued. Its value was to be determined by its original cost and freight, and that price was to be paid for it. The bargain was, in effect, a contract to pay for each article a price to be determined in the manner before stated. The consideration for the promise to pay for the goods is not to be regarded as one and indivisible. The sale and delivery of each article formed the consideration, in this case, for the promise to pay the price of it. The contract was divisible. The fact that the whole stock was sold at the same time can make no difference. The terms of the agreement are to be looked at in determining its character. It was not a case of a sale of an entire stock of goods for an entire price for the whole, without reference to the value of the separate articles sold. Instead of that, there was in fact a particular sum agreed to be paid for each article sold. This, we think, was the legal effect of the contract. And while the separate values of the articles sold

can be ascertained, as fixed by the parties, the principle is not readily seen which would defeat the right of recovery for the stipulated price of that portion, the sale of which was legal. Under a count like the present, less may be recovered than is declared for. A recovery may be had for a part, although the claim may be defeated in part. . . . The contract for the goods sold in this case, then, not being entire, but divisible, and the prices of the several articles being agreed by the parties, and readily ascertainable, we are of opinion that the plaintiff is entitled to recover, under the count for goods sold and delivered, the agreed price of the goods sold, excepting the spirituous liquors.

"There is a distinction between a case in which one or an entire promise, as a note, is made upon a consideration, a part of which is illegal, and a case where for an entirely good consideration several distinct things are granted or contracted to be done, one of which is unlawful. In the former case, the promise is wholly void; in the latter, the grant or promise, so far as legal, may be upheld. *Doe v. Pitcher*, 6 Taunt. 358; *Kerrison v. Cole*, 8 East, 231; *Mouys v. Leake*, 8 T. R. 411; *Leavitt v. Palmer*, 3 Comst. 19, 37; *Wigg v. Shuttleworth*, 13 East, 87; *Howe v. Synge*, 15 East, 440; *Gaskell v. King*, 11 East, 165. See *Greenwood v. Bishop of London*, 5 Taunt. 727; *United States v. Bradley*, 10 Pet. 343; *Hyslop v. Clarke*, 14 John. 458; *Mackie v. Caines*, 5 Cow. 547."

¹ *Widoe v. Webb*, 20 Ohio St. 431.

erations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are inseparable.¹ Whilst a partial *want* or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy."² It has also been held that where a contract is void for illegality, the subsequent repeal of the law which rendered the contract illegal will not relieve it of the objection.³ Nor will a seal protect from inquiry into the legality of the consideration.⁴

If partial payments are made upon a note of which an ascertainable portion of the consideration is illegal, and to a greater amount than the part of the consideration which is illegal, the creditor, in the absence of a special appropriation of such payment, by the debtor, is not at liberty to apply the same in satisfaction of the illegal part of the debt.⁵

¹ Metcalf on Cont. 246; Addison on Cont. 456; Chitty on Contracts, 730; 1 Parsons on Cont. 456; 1 Parsons on Notes & Bills, 217; Story on Prom. Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94.

² And see comments in the same opinion on the case of Doty v. Knox Co. Bank, 16 Ohio St. 133.

³ Roby v. West, 4 N. H. 285; Jaques v. Withy, 1 H. Bl. 65; Gorsath v. Butterfield, 2 Wis. 237.

⁴ Gray v. Hook, 4 Comst. 449; Collins v. Blantern, 2 Wils. 347; Livingston v. Tremper, 4 John. 416; Texbury v. Miller, 19 id. 311.

⁵ Gammon v. Plaisted, 51 N. H.

444; Caldwell v. Wentworth, 14 N. H. 431; Hall v. Clement, 41 N. H. 166; Hilton v. Burley, 2 N. H. 193; Warren v. Chapman, 105 Mass. 87; Haynes v. Nice, 100 Mass. 327; Rohan v. Hanson, 11 Cush. 44. See Deering v. Chapman, 22 Me. 488; Maybin v. Conlon, 4 Dall. 298. In Greenough v. Balch, 7 Greenlf. 461, there was an account between the parties of several transactions, a part of which were legal, and a part illegal. After the last illegal transaction, a payment was made on the account, which was considerably more in amount than the sum of both legal and illegal debits at that

PAROL EVIDENCE ADMISSIBLE TO SHOW DEFECT OF CONSIDERATION.—The question has been much discussed, and has elicited considerable contrariety of opinion, how far a different bargain from that stated in the bill or note may be proved by parol evidence to establish a defect of consideration. It is an undoubted rule of the common law, that parol contemporaneous evidence shall not be received to vary or contradict a written contract.¹ This rule, however, does not preclude proof between proper parties, to negative the presumption which the law raises, that a note or bill is founded on a valuable consideration. Nor does it stand in the way of parol evidence to contradict an express and even specific admission in the paper of a consideration. It may be shown that there was no consideration, or a different one.² Nor does it exclude proof that the note or bill was given for accommodation when sued on by the accommodated party;³ or that it was given for indemnity with a view to limiting recovery to the amount of the loss indemnified

time; this payment was credited, but the account remained open, and all the succeeding debit items were lawful. It was held that a note given for a balance subsequently accruing was not affected by the illegal items, for the new balance was deemed to arise from lawful charges; that the accounts being kept in continuation, did not alter the case; the illegal items had been voluntarily paid, and such payment could not be recovered back.

In *Brisbane v. Pratt*, 4 Denio, 63, the action being in the name of an indorsee of a note, and received after it became due, in the absence of any proof that he paid value for it, held, that there is a presumption that the action is brought for the benefit of the former holder, and his declarations made while he held the note, and after it became payable, that it was given for an illegal consideration, are admissible for the defendant.

¹ 1 Greenlf. Ev. § 275; *Adams v.*

Wordley, 1 M. & W. 374; *Barnstable Savings Bank v. Ballou*, 119 Mass. 487; *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Connor v. Clark*, 12 Cal. 168; *Stackpole v. Arnold*, 11 Mass. 27; *Hoare v. Graham*, 3 Camp. 57; *Hunt v. Adams*, 7 Mass. 518; *Wells v. Baldwin*, 18 John. 45; *Fitzhugh v. Runyon*, 8 John. 375; *id.* 189; *Warren Academy v. Starrett*, 15 Me. 443; *Harlow v. Boswell*, 15 Ill. 56; *Lane v. Sharpe*, 4 Ill. 566; *McCarthy v. Howell*, 2 Ill. 341; *Abrams v. Pomroy*, 13 Ill. 133; *Magee v. Hutchinson*, 7 Ill. 269.

² *Pallen v. James*, 45 Miss. 129; *Folsom v. Mussey*, 8 Greenlf. 400; *Abbott v. Hendricks*, 1 M. & G. 791; *Great Western Ins. Co. v. Rees*, 29 Ill. 272; *French v. Gordon*, 10 Kan. 370; *Cragin v. Fowler*, 34 Vt. 326.

³ *King v. Phillips*, 12 M. & W. 705; *Thompson v. Clubby*, 1 M. & W. 212; *Violett v. Patton*, 5 Cranch, 142; *Moore v. Cross*, 17 How. Pr. 385; *Fant v. Miller*, 17 Gratt. 47; *Robertson v. Williams*, 5 Munf. 381.

against,¹ or for future advances, and with a view to limiting recovery to the amount advanced.²

¹Haseltine v. Guild, 11 N. H. 390; Gilbert v. Duncan, 29 N. J. L. 133; Colman v. Post, 10 Mich. 422; Bowker v. Johnson, 17 id. 42. See *Homan v. Thompson*, 6 C. & P. 717.

²*Lawrence v. Tucker*, 23 How. U. S. 15; *Collins v. Carlile*, 13 Ill. 254. In *Bowker v. Johnson*, 17 Mich. 42, Judge Campbell says: "When a mortgage accompanies a note or bond, it is a mere incident to the principal security, and the note or bond is the substantial evidence of debt. Yet it has always been held that it might be shown that the whole transaction, appearing on its face to be unconditional, was a security for something else, and no enforcement has been allowed for any other purpose than the actual one. The statute of frauds does not prevent trusts in personalty from being evidenced by parol, and a trust is therefore admitted to be shown against all but *bona fide* holders, whether it be to create a special interest, a defeasance, or any other similar equity. See *Catlin v. Birchard*, 13 Mich. 110. This doctrine has been applied in various ways. It has been allowed to convert an absolute deed into a mortgage. *Wadsworth v. Loranger*, Harr. Ch. 113; *Emerson v. Atwater*, 7 Mich. 12. To turn a contract of sale into a mortgage. *Batty v. Snook*, 5 Mich. 231; *Swetland v. Swetland*, 3 id. 482. To show that the original mortgagee had no interest in the securities. *Bishop v. Felch*, 7 Mich. 371. To show that a negotiable note, secured by mortgage, was really given for indemnity. *Colman v. Post*, 10 Mich. 422. To show that a bond and mortgage for a fixed sum was given in consideration of a

promised loan, and a promised conveyance of property, and that there had not been a complete compliance with the promises. *Robinson v. Cromelien*, 15 Mich. 316. In *Bennett v. Beidler*, 16 Mich. 150, a note was given for a sum of money, which was the price of the crops on certain lands purchased at auction at an estimated number of acres, with an agreement that the maker of the note might have a subsequent measurement made to ascertain the true amount of the purchase money. The note having been paid by the maker to a *bona fide* holder, and the land falling short, he was held entitled to recover back the surplus payment." The case under consideration was an action upon a promissory note for \$1,000. Upon the trial, it appeared in evidence that this note, with another of like amount, was given under the following circumstances: Defendant bought out Bowker's interest as partner in a brewery, and was to pay \$3,000, one-third cash, and the balance by these two notes; and was to assume and pay in full all of Bowker's share in the debts of the firm, in which defendant succeeded him, and indemnify him against all liability and damages. Bowker showed a schedule of debts and assets as a basis of this arrangement, and it was agreed that if defendant paid debts beyond what appeared on the schedule, he should be entitled to a corresponding deduction on the notes, which were to be left in bank to stand for that purpose. The defendant gave an unqualified bond to pay and indemnify, and executed the notes. One of the notes was indorsed by Bowker to a *bona fide*

Accommodation paper is made in contemplation of a consideration to be received by the accommodated party; until that consideration accrues, the paper has no validity; when the consideration has arisen, the paper is good within its nominal amount to the extent that upon such consideration the accommodated party could incur a personal obligation. When commercial paper is given to cover a loss which is contingently incurred on the faith of it, or to cover future advances which the receiver of the paper either binds himself or has an option to make, the payee holds it upon a legal consideration from the beginning; but, until the loss happens, in the one case, or advances are made in the other, the promise of payment, between the immediate parties, is dormant. A note given for the premium of insurance, on taking out an open marine policy, is of this character; it becomes operative and valid only as fast as risks are assumed on the policy, and to the extent of the premiums thereby earned.¹ Hence, the real consideration may be contingent, conditional or defeasible, and it may be shown by parol to be so; that it had not arisen, or, if it potentially existed at first, that it afterwards became nugatory, so as to be no consideration to support the promise to pay.

The consideration being open to inquiry, so far as the promise to pay depends upon its existence, continuance or amount,

holder. Defendant paid claims in excess of the schedule list, of which Bowker's half amounted to \$1,459.20. And referring to the case in hand, the learned judge continued: "We can perceive no difference in principle between these cases. Johnson undertook absolutely to pay the debts of Bowker, whatever might be their amount, and did pay them. But the price payable by Johnson was fixed upon the basis that such debts should be taken at a specified sum, and if exceeding that, should entitle him to a corresponding reduction. So far as they were in excess, they reduced the consideration for his notes; and being capable of

pecuniary calculation, and not in the nature of unliquidated damages, stand on the same footing as if he had given an accommodation note, or a note for money, in excess of a money price fixed at the time. The debts were all in existence at the date of the transaction, and when ascertained and paid, reduced to that extent the value received by Johnson of Bowker. The agreement rendered it the duty of Bowker to hold the notes as security for no greater sum than was equitably due, and had he retained them both, they would have been enforceable for no more."

¹ Furniss v. Gilchrist, 1 Sandf. 53.

such promise may be indirectly varied and controlled by parol evidence; not by showing that a different promise from the written one was made, but that it is different in legal effect, as a consequence of a want, cessation or shrinkage of the consideration;—by evidence that the consideration implied had no existence; that it did not continue, or was, or has become, deficient in amount. The promise may thus be altogether undermined, postponed, or reduced. A different agreement cannot be shown from that expressed in the note. A parol agreement, contemporaneous with the making of a note by two, that one of them shall be liable only in the event that it cannot be collected of the other;¹ that a note payable on demand shall not be demanded until the maker's death;² that the note shall be void if a suit be compromised;³ or if a verdict be obtained in an action between other parties,⁴ is not admissible. So a note given for the right to vend a patented article in a particular county, payable at a certain time, cannot be affected by parol evidence that when the note was made it was verbally agreed that it should not be due and payable until sales to a specific amount had been made.⁵ And an absolute note for purchase money of land for which a quit-claim is to be executed, is not subject to be defeated by proof of a contemporaneous parol agreement that if the land should be redeemed the note should be void.⁶ Nor can a parol condition be proved, in an action on such a note, that it is to be void if other interests in the same land cannot be purchased in a particular manner.⁷ The terms of a note, or other written contract, cannot be varied by evidence which goes simply to the fact that a different promise to pay was made by the defendant from that reduced to writing.⁸

¹ Mager v. Hutchinson, 7 Ill. 266.

See *Poke v. Street*, 1 Mood. & Mal. 226.

² *Graves v. Clark*, 6 Blackf. 183; *Woodbridge v. Spooner*, 3 B. & Ald. 233.

³ *Dale v. Pope*, 4 Litt. 166.

⁴ *Foster v. Jolly*, 1 Crompt. M. & R. 703.

⁵ *Harlan v. Boswell*, 15 Ill. 56.

⁶ *Lane v. Sharpe*, 4 Ill. 566.

⁷ *Ely v. Kilborn*, 5 Denio, 514.

⁸ *Erwin v. Saunders*, 1 Cow. 249; *Underwood v. Simonds*, 12 Met. 275; *Adams v. Wilson*, id. 138; *St. Louis Perpetual Ins. Co. v. Homer*, 9 id. 39; *Holzworth v. Koch*, 26 Ohio St. 33; *Bookstaver v. Jayne*, 60 N. Y. 146; *Moseley v. Hanford*, 10 B. & C. 729; *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Hoare v. Graham*, 3 Camp. 57; *Adams v. Wordly*, 1 M. & W.

An instrument not under seal may be delivered upon conditions, the observance of which, as between the parties, is essential to its validity; and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice.¹ While parol evidence is not admissible to vary the effect of an undertaking, or merely to show that it was to be renewed, yet where the note does not contain the whole contract, and is made in pursuance of a contract, it is competent to show what that contract was and the purpose for which it was made.² But this is only competent to show that the note has been diverted from its original purpose, or to show a defect of consideration.³

A plea to an action on a promissory note, payable one day after date, stated that a certain specified part of the sum therein mentioned was included in consideration that suit should not be brought on the note for sixty days; and the suit being brought within that time, it was claimed that there was a partial failure of consideration. On demurrer this plea was held good. Proof of such facts would vary the legal effect of the note, but it does

374; *Connor v. Clark*, 12 Cal. 168; *Mahan v. Sherman*, 7 Blackf. 378; *State v. Overturf*, 16 Ind. 261.

¹ *Benton v. Martin*, 52 N. Y. 570, 574.

² *Bookstaver v. Jayne*, 60 N. Y. 146. The answer of defendant Jayne, to an action upon a promissory note, stated that defendant Glenney, who was a merchant, doing business, was indebted to the plaintiff in the sum of about \$5,000; that an action had been commenced to recover the same; that, to induce defendant to become an indorser, plaintiffs promised that if Jayne would indorse Glenney's note for \$4,000, at three months, they would discontinue said action, and give at least one renewal of the note; that, relying upon said agreement, defendant indorsed the note in suit; that plaintiffs did not perform their agreement,

but, on the contrary, entered up judgment in said action, issued execution, and levied upon said Glenney's stock of goods, and thereby destroyed his credit and caused him to fail in business, and deprived said Glenney of the opportunity of eventually paying the note and relieving defendant of liability, and did not give a renewal of said note. The defendant claimed that thereby his indorsement became null and void. It was held that the plaintiffs utterly failed to carry out the agreement upon which the notes were indorsed by the defendant, and, therefore, had no right to enforce their collection. See *Holzworth v. Koch*, 56 Ohio St. 33; *Adams v. Wordly*, 1 M. & W. 374; *Bellows v. Folsom*, 2 Robt. 138.

³ *Ibid.*

so consequentially, by explaining the consideration.¹ Caton, C. J., said: "It may be that, strictly speaking, the agreement to pay the money mentioned in the note at the time there stated, and the agreement not to enforce the payment of that amount till after the first of June, 1861, all being made at the same time, constituted but one agreement, only that part of it which is embodied in the note being reduced to writing, the rest being allowed to rest in parol, and that by the general rule of law, this latter part which was not embraced in the writing, could not be shown by parol. If that rule is to be applied in this case, then it must in all similar cases, and it would be impossible in any case to show a total or partial failure of consideration of a note by parol, for the consideration of a note must, necessarily, form part of the agreement, in pursuance of which the note is given; that part of the agreement which constitutes the consideration is never reduced to writing, and it must be shown by parol, if it is ever shown. If I agree with you to deliver you my horse, to-morrow, and you give me your note for \$100, in consideration thereof, here only one part of the agreement is reduced to writing by the execution and delivery of the note, and that portion which requires me to deliver the horse, to-morrow, is left in parol. Shall it be said that when I refuse to deliver the horse, I may turn round and say you shall never prove it, because that portion of the agreement was not put into writing? The truth is, that even the common law made an exception to that rule of evidence, in cases where notes or other instruments for the absolute payment of money are given. It has always been admissible to show, by parol, the consideration upon which such instruments were executed. But whatever may have been the rule of the common law, our statute has expressly provided for this defense; and necessarily, to give effect to the statute, parol evidence must be admitted to show what the contract was, as well as to show that the consideration has failed. The statute has made no exception, and we can make none. A note or bond to pay money is necessarily but a part of the agreement between the parties, leaving out as it does all that portion of the agreement which induced the undertaking to pay the money;

¹ Hill v. Enders, 19 Ill. 163; Morgan v. Fallenstein, 27 id. 31.

and if this part could not be shown by parol, there must ever be a liability to a failure of justice. Nor is the exception to the general rule . . . confined to showing by parol a failure of consideration. Usury, and, in fine, any other defense arising out of the original agreement upon which the note was given, or of which the note constitutes a part, may be shown by parol, in order to establish a defense to the note.”¹

It may be shown in defense to an action upon a note which expresses that it is given for a lease, that a part of the consideration was the good will of an insurance business and an insurance list, and that this part of the consideration has been withheld.² So where the maker and payee of a note were owners of certain lands, and the maker took a conveyance of the lands to sell them on joint account, and as security to make prompt payment of the purchase money, after the land should be sold, made the note in question, these facts were deemed admissible; and it appearing that the land remained unsold, there was held to be a want of consideration.³ It is to be observed that a note given under such circumstances, and for such a purpose, is not void for want of consideration. It is valid as a security for the fulfilment of a trust. The transfer of the title to the maker was a consideration. Parol evidence being admissible, even at law, to show the fiduciary character of the transfer, it was permitted to have effect to restrain accordingly the written promise to pay; for upon the real consideration there was no equitable duty to pay until a sale had been made. In view of the trust, there was no consideration for payment until that event—and this defense was a legal one. Caton, C. J., said: “He (the plaintiff) might have held it till a consideration had arisen. This he did not choose to do, but brought his action, when in fact no consideration for the promise existed.” It seems difficult to reconcile with this case, one decided by the same court in the following year.⁴ The opinion was delivered by the same judge, and he states the facts set forth in the notice as a pleading, constituting the alleged defense: “It shows that the

¹ Morgan v. Fallenstein, 27 Ill. 31.

⁴ Walters v. Smith, 23 Ill. 342.

² Great Western Ins. Co. v. Rees, 27 Ill. 272.

See Harris v. Harris, 69 Ind. 181; King v. King, 69 id. 467.

³ Marsh v. Bennett, 22 Ill. 313.

several creditors of Fullenwider met him by appointment, of whom the plaintiff and defendant were two, and in pursuance of an arrangement, then agreed to by all, Walters gave his notes for the amounts of the several debts of the creditors present, as an evidence of the amounts due them from Fullenwider; that this note is one of those then given for the supposed amount due from Fullenwider to Smith. The notice further shows that it was agreed between all parties, that Walters was only to pay the several notes then given, as he should collect the debts due Fullenwider. Now, the notice nowhere states that he has not collected enough to pay all the notes, but it states that afterwards, but how long cannot be learned, the arrangement was broken up by Fullenwider, with the consent of all parties, and the contract set aside, all the parties interested, including Smith, consenting thereto. The notice does not show, except by implication, that Walters was to be empowered to collect Fullenwider's debts." Upon this statement the learned judge proceeds to say: "If this notice is to be understood as stating that it was the agreement that Walters should collect Fullenwider's debts, and pay the proceeds over, *pro rata*, in satisfaction of the notes, as fast as he should collect the money, and that he should be liable to pay the notes only as fast as the collections would enable him to do so, it clearly states a fact which the law cannot allow him to prove. This is not an attempt to prove a want or a failure of consideration of the note, but it is an attempt to vary the terms of the note."¹

¹ The notice of defense which is set out in the report states that the note was given solely upon consideration that Fullenwider "would assign over and deliver to the defendant a large amount of indebtedness due or to become due to him from third persons, and out of the proceeds of which, when collected, the defendant was to pay." Caton, C. J., said: "The paper says the money should be paid on or before the 25th of December, 1859, absolutely. The offer of parol proof is, that he did not agree to pay the

money, absolutely, on that or any other day, but that he only made a conditional promise that he would pay the note if he collected the money, but never without. Our statute allowing the failure or want of consideration of a note to be proved by parol, never intended to allow parol proof to change the terms of a note which has been delivered and become operative. The rule that the writing must speak the intention of the parties, is as applicable to a note as to any other written instrument. It is, no doubt,

In a case in Mississippi,¹ the administrator for a deceased person, at a sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and he offered and agreed, that in case they should be seized under the judgments, the sale should be considered as void, and the notes of the purchasers be given up. The slaves, on that assurance, sold for their full value. In an action brought by the administrator on a note given for the purchase money, it was held that the makers of the note might show under the general issue that the slaves for the price of which the note was given were taken out of their possession and sold under judgments against the estate, and that the consideration of the note had thus failed. The court say the rule of law that parol testimony cannot be heard to vary written agreements, has never been carried so far as to defeat the right to prove a failure of consideration.²

A promise cannot be enforced in full, unless the consideration exists and continues intact as the promisee is bound to furnish and maintain it. The consideration of commercial paper may, and usually does, exist in parol; it may be intrinsically or conventionally conditional or contingent; it may be subject to suspense, change or rescission by oral stipulation; its value and duration may be assured or determinable in the same manner, and so that the defendant's promise will also be correspondingly absolute or mutable; be enforceable in full when the consideration is intact, and wholly or in part discharged if it be wanting; if it fail entirely or partially.

competent to show what the note was given for, but that does not alone constitute a defense; but in order to make out a defense, it is necessary to show that Walters did not at the time promise as the paper says he did. This it was inadmissible to show by parol. What we said in *Lane v. Sharp* (3 Scam. 566) is directly applicable to this case; and sufficiently expresses our view of the law on this subject."

In *Great Western Ins. Co. v. Rees*, supra, the court say: "The ruling of this court, in *Lane v. Sharp*, and in all subsequent cases founded upon

that, is to be considered as having no application to a case where no consideration, or a total or partial failure of consideration, is properly pleaded in an action brought upon an instrument of writing for the payment of money or property, or the performance of covenants or conditions to an obligee or payee." See *Mann v. Smyser*, 76 Ill. 365; *Nichols v. Hunton*, 45 N. H. 470.

¹ *Nickels v. Cunningham*, 6 S. & M. 358.

² *Sumner v. Williams*, 8 Mass. 162; *Shepherd v. Temple*, 3 N. H. 455; *Tillotson v. Grapes*, 4 N. H. 444.

The cases already referred to of notes given for a special purpose, as for indemnity, for future advances, or as security for other acts than that of paying the precise money mentioned in the instrument, are illustrations of the defeasibleness of such written promises, as well as of the flexible nature and efficiency of the law in maintaining the conventional equipoise of right and obligation between the parties, by proof relating to the consideration.

These principles were clearly recognized in an early case in Maine.¹ The defendant was a wharfinger in G, to whom the plaintiff, living in P, had been in the practice of sending his lumber, of various kinds, for sale; which the defendant sometimes sold for cash, and sometimes on credit. Whenever he made sales, he credited the plaintiff with the amount; it being, however, understood that he was not to be debtor therefor to the plaintiff till he should actually receive the money. On the 10th of June, 1828, he sold to one H four hundred and seventy-eight dollars' worth of the plaintiff's lumber, taking his negotiable note for that sum, payable to the plaintiff in ninety days; the purchaser then being in good credit, and the time comporting with the usage in such cases. For the proceeds of this sale, among others, the plaintiff was credited in the defendant's books, at the date of the note in suit. The plaintiff wishing to make arrangements to preserve his property from being sacrificed by his creditors, made a nominal sale to the defendant, of all his lumber then on the defendant's wharf; for the amount of which, and of the sum credited as above to the plaintiff in the defendant's books, including the amount sold to H, the note in controversy was made; it being then agreed orally between the parties, that the defendant should sell the lumber, and collect what was due for lumber already sold, and account to the plaintiff for the same, in the same manner as if no note had been given; and that his liability to the plaintiff should not be changed or affected by his giving the note. The plaintiff then indorsed the note of H to the defendant. Here was a sale, in form and legal effect between the parties, though voidable by creditors, of lumber and a note; and the question was whether

¹ Folsom v. Massey, 8 Greenlf. 400.

the note should be enforced for the full amount expressed, or whether the amount collectible thereon should be adjusted according to the eventual value of the consideration under the verbal bargain contemporaneously made. The opinion of the court by Weston, J., places the judgment upon broad principles which are believed to be sound, and in accord with the best authorities of later date. He says: "It is an undoubted rule of the common law, that parol testimony shall not be received to vary or contradict a written contract. In support of this principle many cases have been cited. That the defendant did make the contract declared on, is not controverted. It is a note of hand, which, like a specialty, imports a consideration; and indeed acknowledges one. Shall this written acknowledgment be contradicted by parol evidence? The rule upon which the defendant relies, strictly understood, would exclude it. And yet that such evidence is admissible for this purpose is as well settled as the rule. Between the decisions which illustrate and enforce the rule, and those which recognize the exception, there may be an apparent discrepancy. But that will generally be found to arise from the different aspects in which they have been viewed. The case of *Barker v. Prentiss*,¹ and the opinion of Chief Justice Parsons there given, has maintained its ground in practice; although the language used in subsequent opinions . . . appears sometimes to lose sight of the distinctions there made. The position laid down in that case is, that in all written simple contracts, evidence of the consideration may be received between the original parties. And this is the uniform practice of our courts. If upon this inquiry it results that there was no consideration, or that it has failed totally or partially, or that the contract was signed under mistake or misapprehension, the rights of the parties are determined as the justice of the case requires, upon a view of all the facts. The plaintiff fails to recover, or he recovers a part only, of what the note or other contract expresses, according to equity and good conscience. Of this character was the evidence in the case before us. It went to the consideration. The lumber which formed part of the consideration of the note was as-

¹ 6 Mass. 430.

sumed to be worth a certain sum; but its final value was to depend on the sales. If overvalued, there would be a failure of consideration by the amount of the excess. If undervalued, the defendant was to pay the difference. As the estimate fell short of the value as ascertained, this part of the evidence operated in favor of the plaintiff. With regard to that part of the note in suit which arose from the H debt, if that was not at the defendant's risk, if lost without negligence imputable to him, there would be a failure of consideration to that amount. Now the evidence proves that the defendant did not become the guarantor of the H note, and that it was not taken at his risk. It has been lost. That loss must fall upon the plaintiff, unless negligence in relation to it is chargeable to the defendant."

On like principles, in an action against the maker of a promissory note by an assignee with notice, it was held a good defense that the note was given in consideration of a tract of land, and that at the time of making the note it was verbally agreed between the payee and the defendant that he should not be called on for the payment of the note until the payee should obtain a patent from the United States for the land, which was expected before the note would, by its terms, mature, and that the payee had not obtained the patent.¹ The court allowed the defense because the consideration for which the note was given had not been received by the defendant.

Where a note was given instead of a receipt for money paid before it was due, the transaction was allowed to be proved by parol, and the fact being admitted by demurrer, it was held that there was no ground for a promise.² And where the only consideration of a promissory note was a promise by the payee to convey to the maker on payment of the note a tract of land, if the payee should own it, and if not, that he would buy it as cheap as he could and let the maker have it at cost, and the payee died insolvent before the note became due, without any title to the land, it was considered that the consideration of the note had wholly failed and the maker had a right to treat it as a nullity.³ So in an action upon a note given for the price of

¹ Gorham v. Peyton, 3 Ill. 363.

See First National Bk. v. Breese, 39 Iowa, 640.

² Slade v. Halsted, 7 Cow. 322.

³ Tillotson v. Grapes, 4 N. H. 455.

personal property, a parol agreement for a deduction in case the property shall not prove to be of certain quality, was deemed equivalent to a warranty; and on that defense the action was defeated.¹

An assurance given to a surety by the obligee, when solicited by the obligor to execute with him a writing obligatory, that the signing was but a matter of form, and that he should not be applied to for payment, has been provable as tending to prove that the execution of the instrument was procured by fraud, in an action against such surety, to enforce the obligation.² An acceptor sued by the indorsee of a bill may show by parol that the acceptance was for the plaintiff's accommodation, and without consideration; and for this purpose that it was agreed that the bill, when due, should be taken up by the plaintiff.³ A note purported to be for consideration due to the plaintiff for business transacted for the defendant; but it was allowed to be shown by parol that the real consideration for which the note was made was future services which had not been performed.⁴

Where the consideration of a note was the assignment of a half interest in a bond for the conveyance of land, and it was agreed between the parties that the assignee should pay, by his note to the assignors, the same amount they had given therefor, and, through the misrepresentation of the assignors, the note was taken for four times the sum paid for the same, the recovery was limited to the amount actually paid.⁵ It is often difficult to determine, on a given state of facts, whether the parol evidence offered goes to the contract or the consideration. The difficulty is particularly apparent where a note or bill is based upon some precedent transaction, and by a contemporaneous verbal agreement resort may be had to that transaction for a new and more accurate statement of the amount of the debt, or of some ground of deduction; or it is agreed that in a specified event the note or bill is to be void without actual payment; or

¹ *Shepherd v. Temple*, 3 N. H. 455.

² *Miller v. Henderson*, 10 S. & R. 290; *Hain v. Kalbach*, 14 S. & R. 159; *Zabert v. Grew*, 6 Wheat. 404. But see *Barnstable Savings Bk. v. Ballou*, 119 Mass. 487.

³ *Thompson v. Clubby*, 1 M. & W. 212.

⁴ *Abbott v. Hendricks*, 1 M. & G. 791. See *Pecker v. Sawyer*, 24 Vt. 459.

⁵ *Stevens v. McIntire*, 14 Me. 14.

that it shall be paid only out of some special fund contemplated to exist. In cases of doubt there is a leaning—of the English more strongly than of the American courts—against the admission of the evidence, and even where there is much reason to believe that the inducement to make or become party to the bill or note was the promise held out of relief from the obligation, in whole or in part, in the manner indicated by such extraneous proof. If the evidence tends to show a defect of consideration, it is admissible,¹ but otherwise not. This test, however, has not in all cases been very rigidly observed.²

THE AMOUNT RECOVERABLE AS PRINCIPAL SUM AGAINST DRAWER AND INDORSERS.—All persons joining in drawing a bill are liable to the holder as drawers, whether personally interested in the consideration or not; an accommodation drawer is liable to all parties who become the holders, except the accommodated party, and in the due course of business, unless there has been a diversion of the paper from the special use intended, when it is good only to a *bona fide* holder for value. Where several persons join as drawers, they are also jointly liable to the acceptor, if they draw without funds, and he pays the bill. It is money paid at their request, and the amount paid is recoverable.³ “The presumption that the drawer has funds in the hands of the acceptor may be rebutted. The drawer may show that he accepted and paid the bill for the accommodation of the drawer, and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor. On this implied obligation the acceptor

¹ Smith v. Brooks, 18 Ga. 440.

² See Goddard v. Hill, 33 Me. 582; Mahan v. Sherman, 7 Blackf. 378; Miller v. White, id. 491; Leighton v. Grant, 20 Minn. 345; Lash v. McCormick, 17 id. 403; Walters v. Armstrong, 5 Minn. 448; Spring v. Lovett, 11 Pick. 417; Campbell v. Hodgson, Gow. 74; Moseley v. Hanford, 10 B. & C. 729; Hodgkins v. Moulton, 100 Mass. 309; Sawyer v. Chambers, 44 Barb. 42; Allen v. Furbish, 4 Gray, 504; Pecker v. Sawyer, 24 Vt. 459;

Warren Academy v. Sturrett, 15 Me. 443; Isaacs v. Elkins, 11 Vt. 679; Fairfield T. Co. v. Thorp, 13 Conn. 173; Foster v. Jolly, 1 Cr. M. & R. 703; Pike v. Street, 1 Mood. & Mal. 226; Susquehannah B. & B. Co. v. Evans, 4 Wash. C. C. 480; Hill v. Ely, 5 S. & R. 363; Abbott v. Hendricks, 1 M. & G. 791; Conner v. Clark, 12 Cal. 168; Hyde v. Tenuiakel, 26 Mich. 93.

³ Griffith v. Reed, 21 Wend. 502.

may have an action against the drawer, but not on the bill itself.¹ As between the drawer and drawee, the bill is a mere request or direction to pay money; it never speaks, as it does between other parties, the language of contract, or imports any obligation. When the acceptor sues, whether he declares specially on the implied promise to indemnify, or generally for money paid, the bill itself is not the foundation of the action; it is but an item of evidence."² The drawer's contract, as such, to the holder of the paper, is to pay the sum mentioned in the bill, conditionally; that is, if the bill be not accepted and paid by the drawee, and notice of the dishonor be duly given. His liability is like that of the first indorser of a promissory note.³

The drawing as well as the negotiating of a bill implies an undertaking to the payee, and to every other person to whom the bill may afterwards be transferred, that the drawee is a person capable of accepting the bill, and making himself responsible for its payment; that he shall, if applied to for that purpose, express in writing upon the bill an undertaking to pay it when it shall become payable; that he shall pay it, on presentment for that purpose, when it becomes payable; and that if the drawee fail to do either, he, the drawer, will pay the amount stated in the bill, with legal damages thereon, provided he have due notice of the dishonor.⁴ The indorsement of a bill or note is equivalent to the drawing of a bill; the former is like a new bill drawn by the indorser on the drawee or acceptor;

¹ *Id.*, per Bronson, J.; *Young v. Hockley*, 3 Wils. 346; *Chilton v. Whiffin*, *id.* 13; *Chitty on Bills*, 344, 410.

² *Griffith v. Reed*, *supra*. It was held in this case that there was no implied promise of the surety drawn to repay the acceptor.

But in *Suydam v. Westfall*, 2 Denio, 205, such an action was sustained by the court of errors. Backee, Senator, said: "As relates to all intervening parties, the acceptor of a bill of exchange is considered to stand in the same position as the maker of a promissory note. The drawers are in the character of

indorsers. But this analogy ceases when the acceptor has paid the bill from his own funds. The relation between the drawer and the drawee is then reversed, and the former becomes the debtor."

³ 1 Par. on N. & B. 54; *Ballingalls v. Glaster*, 3 East, 481; 4 Esp. 268.

⁴ *Bayley on Bills*, ch. 5; *Story on Bills*, § 108; *Edw. on Bills*, 287; *Evans v. Gee*, 11 Pet. 80; *Mellish v. Simeon*, 2 H. Bl. 378; *Milford v. May*, 1 Doug. 55; *Mason v. Franklin*, 3 John. 202; *Walker v. Bank of the State of N. Y.* 13 Barb. 636; 5 Seld. 582.

and the latter by the indorser on the maker, in favor of the indorsee.¹ Such indorser warrants that the bill or note will be accepted and paid, according to its tenor; that it is in every respect genuine; that it is valid; that the ostensible parties are competent, and that he has lawful title to it and right to indorse it.² Of course, if the drawer or indorser's contract in any of these particulars is not fulfilled, he is liable, either on the principle of the failure of consideration, or on the contract.³

One who transfers such paper without indorsement impliedly warrants that it is valid, so far, at least, as he has been connected with its origin; as that it is not to his knowledge void for usury.⁴ So, a drawer or indorser without recourse undertakes that the paper is what it purports to be, a valid obligation of those whose names are upon it.⁵ He is liable if any of the prior signatures are not genuine;⁶ if the instrument was invalid between the original parties by reason of payment or set-off,⁷ for want of consideration,⁸ or illegality of the consideration, or if any prior party was incompetent, or the indorser without title;⁹ so if there be fraud or misrepresentation.¹⁰

Although the drawer or indorser is held to such implied warranties, the damages are not assessed in respect to the principal sum, according to the general rule applicable to warranties of quality or title of personal property, which is that the warrantor shall pay so much as the actual value of property falls short of what it would be worth if the warranty had been kept

¹ Grinnell v. Herbert, 5 A. & E. 436.

² 1 Dan. on Neg. Inst. § 669; Turnbull v. Bowyer, 40 N. Y. 456; Blethen v. Lovering, 58 Me. 437; Bank of Commerce v. Union Bank, 3 N. Y. 230; Coolidge v. Brigham, 1 Met. 547; Mills v. Barney, 22 Cal. 240. See Swall v. Clark, 51 Cal. 227.

³ Chitty on Bills, *95; Edw. on Bills, 291; 1 Dan. on Negotiable Inst. § 669; Canal Bank v. Bank of Albany, 1 Hill, 287; Little v. Derby, 7 Mich. 325; Gurney v. Wormersley, 28 Eng. L. & Eq. 256; Appleton Bank v. McGilvray, 4 Gray, 518.

⁴ Delaware Bank v. Jarvis, 20 N. Y. 226. See Brown v. Montgomery, id. 287.

⁵ 1 Dan. Neg. Inst. § 670.

⁶ Damon v. Williamson, 18 Ohio St. 515.

⁷ Ticonic Bank v. Smiley, 27 Me. 225.

⁸ Blethen v. Levering, 58 Me. 437; Gormpette v. Bartlett, 24 Eng. L. & Eq. 156.

⁹ 1 Dan. Neg. Inst. § 670.

¹⁰ Prettyman v. Short, 5 Harr. (Del.) 360. See Curtis v. Brooks, 37 Barb. 476.

good. On the contrary, where recourse is had to an indorser, the recovery on account of the principal sum is limited to the amount paid; in other words, the recovery is a compulsory refunding of the consideration.¹ Where, however, a party purchases accommodation paper at less than its face, on representations made by the parties to it that it is business paper, and he relies on such representations, he will be entitled to the whole sum payable by its terms, although it exceeds the amount paid for it, with the legal interest thereon.² And if an indorser who has been made liable to his indorsee on account of his indorsement settles with the latter, and obtains a transfer of the bill, he may recover on it from the acceptor, for his own use, the same amount which his indorser might have recovered, or rather what he would have recovered if he had not negotiated the bill. And it is immaterial whether, upon such transfer, he paid more or less, or merely gave a new security.³

INTEREST ON NOTES AND BILLS.—Interest is only allowed before maturity when expressly stipulated for; but when it is expressly reserved, it is calculated from the date of the instrument, unless a different time is specified for the interest to begin.⁴ The simple words, “with interest,” or similar phrase, will suffice to give interest from date.⁵ And on such a general reservation of interest, it may be recovered from date until paid,

¹ *Munn v. Commissions Co.* 15 John. 43; *Cram v. Hendricks*, 7 Wend. 569; *Ingalls v. Lee*, 9 Barb. 647; *Hutchins v. McCann*, 7 Porter, 94; *Noble v. Walker*, 32 Ala. 456; *Ruplee v. Morgan*, 3 Ill. 561; *Shaef-fer v. Hodges*, 54 Ill. 337; *Braman v. Hess*, 13 John. 52; *Short v. Coffin*, 76 Ill. 245; *Wynn v. Poynter*, 3 Bush, 54; *Semmes v. Wilson*, 5 Cr. C. C. 285; *Bank of U. S. v. Smith*, 4 id. 712; *Cook v. Clark*, 4 E. D. Smith, 213; *Judd v. Seaver*, 8 Paige, 548. In *Mechanics' Bank v. Minthorne*, 19 John. 244, it was held that the plaintiff, as indorsee, was not precluded from recovering against the indorser seven per cent.,

the legal rate, by having discounted the note at six per cent.

² *Burrell v. DeGroat*, 5 Duer, 379.

³ *Deas v. Harvie*, 2 Barb. Ch. 448.

⁴ *Kennerly v. Nash*, 1 Stark, 453; *Hopper v. Richmond*, id. 507.

⁵ *Id.*; *Dewey v. Bowman*, 8 Cal. 145; *Winn v. Young*, 1 J. J. Marsh. 51; *Ely v. Witherspoon*, 2 Ala. 131; *Dickinson v. Tunstall*, 4 Ark. 170; *English v. Watkins*, id. 199; *Kilgore v. Powers*, 5 Blackf. 22; *Pate v. Gray*, Hemp. C. C. 155; *Doman v. Dibden*, Ry. & M. 381; *Whitters v. Swope*, 1 Litt. 160; *Roffey v. Greenwell*, 10 A. & E. 222; *Conners v. Holland*, 113 Mass. 50; *Pittman v. Barrett*, 34 Mo. 84.

although at maturity no suit could be brought.¹ And it is the same if payable at the end of a specified time from the death of the maker.²

Generally speaking, an instrument of this sort, reserving interest in general terms, carries interest from date, whether payable on demand or at a specified time. The reason is, that the party making the promise is expected to keep it; and, if he does, no interest can be due from any other period than the date.³

The courts adopt a construction favorable to interest, or most strongly against the maker; and where interest is provided for in general terms to be paid in case the note shall not be paid at maturity, it is computed from date.⁴ The rate of

¹ A married woman being administratrix, received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her with interest; *held*, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action upon it against either of the other makers, at any time within six years after the death of her husband, and recover interest from the date of the note. *Richards v. Richards*, 2 B. & Ad. 447.

² *Roffey v. Greenwell*, 10 A. & E. 222.

³ *Id.*; Lord Denman said in this case: "There is, indeed, another period from which it might be computed, that of the maker's death; but it appears improbable that, if that was his intention, he should not have expressed it with more distinctness. We think that, in the absence of all particular proof, we must presume the note to have

been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker." *Washband v. Washband*, 24 Conn. 500; *Adairs v. Wright*, 14 Iowa, 22. See *Carter v. King*, 11 Rich. 125; *Rollman v. Baker*, 5 Humph. 406; *Powell v. Guy*, 3 Dev. & Batt. 70.

⁴ Several notes were payable at distant days; some at three per cent. per annum, if paid at maturity; "if not, six per cent. interest to be paid;" and one payable without interest, "until the note is out, if not paid then, lawful interest until paid; the notes were not paid at maturity; and it was held that interest was recoverable, according to the agreements therein, from date. *Daggett v. Pratt*, 15 Mass. 177; *Parvin v. Hoopes*, *Morris (Ia.)*, 294; *Horn v. Nash*, 1 Iowa, 204; *Hackenbury v. Shaw*, 11 Ind. 392. The cases of *Billingsly v. Cahoon*, 7 Ind. 184, and *Wernway v. Mothershead*, 3 Blackf. 401, are perhaps distinguishable, and not to be considered as inconsistent; because, in each of these cases, the agreement was for a higher rate of interest, upon default, than the law would give, in the absence of any

interest stipulated for to be paid before maturity generally governs to the date of payment or judgment, if not in contravention of any statute;¹ and upon the assumption that such was the intention of the parties, such agreements for interest are construed to mean that interest at the conventional rate shall continue not only to the time specified for payment, but until actual payment. There is, however, a want of harmony in the decisions upon this point. In Minnesota, the legal rate governs arbitrarily after maturity, if the parties have stipulated for a rate generally above the legal rate, or have even agreed, in express terms, that such rate shall be computed until the debt is paid. Any rate in excess of the legal rate stipulated to be paid while the debtor is in default is treated as penalty, and only the legal rate is allowed.² In many cases elsewhere it has been held that the agreement fixing the rate without specifying the period for which it shall be computed is intended to have effect only during the period of credit; that if the parties desire to regulate the rate to be allowed afterwards, they should do so expressly by agreeing that it shall continue after maturity, or "until paid."³ In Connecticut, the conventional rate before maturity is applied during the period of default, not so much on the ground that the contract as such covers that period, as on the principle that it should be deemed a just rate, because the parties had agreed to it before maturity.⁴

A stipulation for interest without stating the rate is a contract for the legal rate; and this rate, and the validity of any stipulation specifying the rate, are to be determined by the law of the place of contract, which is the place where the contract is entered into, unless it was entered into with reference to the laws of some other state or country. A contract is governed by the laws of the place where it is to be performed.⁵ If made

agreement; and hence, as effect could be given to the language employed, without allowing interest from the date of the notes, interest was allowed to run from their maturity only. 2 Par. on N. & B. 392, note *d*. See *Flanders v. Chamberlain*, 24 Mich. 305.

¹ See ante, vol. 1, p. 541.

² See ante, vol. 1, p. 554.

³ See ante, vol. 1, p. 549; *Brewster v. Wakefield*, 23 How. 127; *Burnhisel v. Firman*, 23 Wall. 170.

⁴ See ante, vol. 1, p. 548, n.

⁵ *Gaylord v. Johnson*, 5 McLean, 448; *Arrington v. Gee*, 5 Ired. L. 590; *M'Queen v. Burns*, 1 Hawks, 476; *Doris v. Coleman*, 7 Ired. L. 424; *Hunt's Ex'r v. Hall*, 37 Ala. 702; *Barney v. Newcomb*, 9 Cush.

in one state or country and payable in another, and not made to evade the usury laws of one of them, it will be sustained if the rate of interest is lawful by the laws of either.¹ But the

46; *Campbell v. Nichols*, 33 N. J. L. 81; *Lee v. Sellock*, 20 How. Pr. 275; S. C. 33 N. Y. 615; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Cook v. Moffat*, 5 How. U. S. 295; *Bright v. Judson*, 47 Barb. 29; *Everett v. Vandryes*, 19 N. Y. 436; *Bailey v. Heald*, 17 Tex. 102; S. C. 14 Tex. 226; *Lizardi v. Cohen*, 3 Gill, 430; *Worcester Bank v. Wells*, 8 Met. 107; *Lewis v. Owen*, 4 B. & Ald. 654; *Smith v. Buchanan*, 1 East, 6; *Quin v. Keefe*, 2 H. Black. 553; *Bainbridge v. Wilcocks*, Bald. 536; *Boyce v. Edwards*, 4 Pet. 111; *Cooper v. Waldegrave*, 2 Beav. 282; *Braynard v. Marshall*, 8 Pick. 194; *Wilde v. Sheridan*, 11 Eng. L. & Eq. 380; *Barker v. Sterne*, 25 Eng. L. & Eq. 502; *Hanrick v. Andrews*, 9 Port. 9; *Healey v. Gorman*, 15 N. J. L. 328; *Evans v. Clark*, 1 Port. 388; *Evans v. Irwin*, id. 390; *Chase v. Drew*, 47 N. H. 405; *Hoppins v. Miller*, 17 N. J. L. 185; *Butters v. Olds*, 11 Iowa, 1; *Burton v. Anderson*, 1 Tex. 93; *Lines v. Mack*, 19 Ind. 223; *Peacock v. Banks*, Minor (Ala.), 387; *Peck v. Mayo*, 14 Vt. 33; *Ramsey v. McCauley*, 2 Tex. 189; *Chambliss v. Robertson*, 23 Miss. 302; *Jack v. Nichols*, 5 N. Y. 178; *Kavanaugh v. Day*, 10 R. I. 393; *Hackettstown Bank v. Rea*, 6 Lans. 455; S. C. 64 Barb. 175; *Agricultural Nat. Bank v. Sheffield*, 4 Hun, 421; *Scofield v. Day*, 20 John. 102; *Newman v. Kershaw*, 10 Wis. 333; *Findlay v. Hall*, 12 Ohio St. 610; *McClintick v. Cummins*, 3 McLean, 158; *Consequa v. Willings*, Pet. C. C. 229; *Archer v. Dunn*, 2 W. & S. 327; *Ralph v. Brown*, 3 W. & S. 395; *Anon. Mart. & Hayw.* 149; *Consequa v. Fanning*, 3 John. Ch. 587; S. C. 17 John. 511;

Stewart v. Ellice, 2 Paige, 604; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Irvine v. Barrett*, 2 Grant's Cas. 73; *Roberts v. McNeely*, 7 Jones' L. 506; *Sevet v. Dodge*, 12 Miss. 667; *Gaillard v. Ball*, 1 Nott. & McC. 67; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Cowqua v. Lowdebrun*, 1 id. 521; *Busby v. Caraac*, 4 id. 296; *Bank of Illinois v. Brady*, 3 McLean, 268; *Moore v. Davidson*, 18 Ala. 209; *Lefler v. Dermotte*, 18 Ind. 246; *Von Hemert v. Porter*, 11 Met. 210; *Winthrop v. Carlton*, 12 Mass. 4; *Hawley v. Sloe*, 12 La. Ann. 815; *Little v. Riley*, 43 N. H. 109; *Bolton v. Street*, 3 Cold. 31; *Summers v. Mills*, 21 Tex. 77; *Whitlock v. Castro*, 22 id. 108; *Butler v. Meyer*, 17 Ind. 77; *Bent v. Lauve*, 3 La. Ann. 88; *Smith v. Smith*, 2 John. 235; *Don v. Lippmann*, 5 Cl. & F. 1; *Balme v. Wombough*, 38 Barb. 352; *Collins Iron Co. v. Burkham*, 10 Mich. 283; *Fergusson v. Tyffe*, 8 Cl. & F. 121; *Cash v. Kennion*, 11 Ves. 314; *Robinson v. Bland*, 2 Burrow, 1077; *Ekins v. East India Co.* 1 P. Wms. 395; *Houghton v. Page*, 2 N. H. 42; *Lapice v. Smith*, 13 La. 91; *Mullin v. Morris*, 2 Pa. St. 85; *Chapman v. Robertson*, 6 Paige, 627; *Richards v. Globe Bank*, 12 Wis. 692; *McAllister v. Smith*, 17 Ill. 328; *Van Schaick v. Edwards*, 2 John. Cas. 355; *Pearce v. Wallace*, 1 Har. & J. 48; *Goddin v. Shipley*, 7 B. Mon. 575.

¹*Andrews v. Pond*, 13 Pet. 65; *Richards v. Globe Bank*, 12 Wis. 692; *Jewell v. Wright*, 12 Abb. 55; reversed, 30 N. Y. 259; *Kilgore v. Dempsey*, 25 Ohio St. 413; *Bowen v. Bradley*, 9 Abb. N. S. 395; *Cope v. Wheeler*, 41 N. Y. 303; *Agricul-*

fate of a contract which violates the laws of both the country or state where it is made and those where it is to be performed, will be determined by the former.¹

Where the rate is governed by any other than the law of which the court takes judicial notice, it is for the jury to ascertain what the rate by that law is as a fact; but it is for the court, as a matter of law, to direct them as to the place according to whose laws the interest is to be assessed.² Where the rate of interest is governed by the laws of another jurisdiction they must be alleged and proved;³ otherwise interest according to the law of the forum will be given.⁴

INTEREST AS DAMAGES TO BE PAID BY MAKER OR ACCEPTOR.—Where the note or bill is silent as to interest, none is payable until maturity. If the paper be not then paid, interest is universally allowed from maturity, unless the delay is by the fault of the holder.⁵ And so much is interest the customary and invariable compensation for money delinquent on commercial paper, that where a party undertakes to pay a debt by means of a bill or note, and fails to do so, interest will be allowed

tural Nat. Bank v. Sheffield, 4 Hun, 421; Vliet v. Camp, 13 Wis. 198; Engler v. Ellis, 16 Ind. 475.

¹ Andrews v. Bond, *supra*; Pine v. Smith, 11 Gray, 38; Mix v. Madison Ins. Co. 11 Ind. 117; Adams v. Robertson, 37 Ill. 45.

² Gibbs v. Fremont, 9 Exch. 25; Leavenworth v. Brockway, 2 Hill, 201; Wheeler v. Pope, 5 Tex. 262; Hill v. George, *id.* 87; Pridgen v. McLean, 12 *id.* 420; Ingram v. Drinkard, 14 *id.* 351; Evans v. Clark, 1 Port. 388.

³ Sarlott v. Pratt, 3 A. K. Marsh. 174; Burton v. Anderson, 1 Tex. 93; Wheeler v. Pope, 5 Tex. 262; Hill v. George, *id.* 87; Abel v. McMurray, 10 *id.* 350; Pridgen v. McLean, 12 *id.* 420; Ingram v. Drinkard, 14 *id.* 351; Evans v. Clark, 1 Port. 388. According to the foregoing cases, where the note sued on is payable in another state, no interest at all can be

allowed unless the law of the state where it is payable is proved and shows a right to interest.

⁴ Sarlott v. Pratt, 3 A. K. Marsh. 174; Desnoyer v. McDonald, 4 Minn. 515; Martin v. Martin, 1 Sm. & M. 176; Brown v. Gracy, Dowling & Ry. N. P. 41; De La Chaumette v. Bank of England, 9 B. & C. 208; Fouke v. Fleming, 13 Md. 392; Whidden v. Seelye, 40 Me. 247; Deem v. Crume, 46 Ill. 69; Prince v. Lamb, 1 *id.* 378; Chumasero v. Gilbert, 26 *id.* 39; Hall v. Kimball, 58 *id.* 58; Lougee v. Washburn, 16 N. H. 134; Hall v. Woodson, 13 Mo. 462; Gordon v. Phelps, 7 J. J. Marsh. 619; Leavenworth v. Brockway, 2 Hill, 201; Booty v. Cooper, 18 La. Ann. 565.

⁵ Gantt v. Mackenzie, 3 Camp. 51; Mayne on Dam. 105; Thorndike v. U. S. 2 Mason, 1; Robinson v. Bland, 2 Burr. 1077; Bann v. Dalzel, Moody

as it would accrue upon such note or bill if it had been given according to the undertaking.¹ If payable on demand, interest does not commence until the demand is made by suit or otherwise.² But a note expressing no time when payable is due immediately, and bears interest from date.³

The rate of interest, after maturity, for default of payment, even when not expressly or by implication fixed by contract, is generally held to be the rate prescribed by the law of the place of contract; in other words, the law of the place where the note is made payable, or of the place on which the bill is drawn.⁴ If no place of payment is mentioned, the place where the note is made, or the bill accepted, is the place of contract. But the place of contract may be affected by circumstances, as the residence of the parties, and the place where the money is to be used.⁵ A bill was drawn on a resident of the state of New York; and by him accepted to be paid in that

& M. 228; *Laing v. Stone*, 2 M. & Ry. 561; *Greenleaf v. Kellogg*, 2 Mass. 568; *Hastings v. Wiswall*, 8 Mass. 455.

¹*Marshall v. Poole*, 13 East, 98; *Slack v. Lowell*, 3 Taunt. 157; *Farr v. Ward*, 3 M. & W. 25; *Rhodes v. Selsey*, 2 Beav. 359; *Beeher v. Jones*, 2 Camp. 428, note.

²*Hudson v. Daily*, 13 Ala. 722; *Vaughan v. Goode*, Minor (Ala.), 417; *Freeland v. Edwards*, Mart. & Hayw. 207; *Lewis v. Lewis*, id. 191; *Hard v. Palmer*, 21 U. C. Q. B. 49; *Patrick v. Clay*, 4 Bibb, 246; *Bartlett v. Marshall*, 2 Bibb, 467; *Schmidt v. Limehouse*, 2 Bailey, 276. See *Darling v. Woorster*, 9 Ohio St. 518.

³*Gaylord v. Van Loan*, 15 Wend. 308; *Lewis v. Lewis*, Mart. & Hayw. 191; *Freeland v. Edwards*, id. 207; *Purdy v. Phillips*, 1 Duer, 369; *Francis v. Castleman*, 4 Bibb, 282.

⁴*Campbell v. Nichols*, 33 N. J. L. 81; *Seofield v. Day*, 20 John. 102; *Mullen v. Morris*, 2 Pa. St. 85; *Boyce v. Edwards*, 4 Pet. 111; *Braynard v. Marshall*, 8 Pick. 194; *Chapman v.*

Robertson, 6 Paige, 627; *Thompson v. Powles*, 2 Sim. 194; *Hosford v. Nichols*, 1 Paige, 220; *Gaylord v. Johnson*, 5 McLean, 448; *Bank of Illinois v. Brady*, 3 id. 268; *Bright v. Judson*, 47 Barb. 29; *Lee v. Selleck*, 33 N. Y. 615; *Cooke v. Crawford*, 1 Tex. 9; *Burton v. Anderson*, id. 93; *Wheeler v. Pape*, 5 id. 262; *Andrews v. Hoxie*, id. 171; *Barney v. Newcomb*, 9 Cush. 46; *Hunt v. Hall*, 37 Ala. 702; 2 Par. on N. & B. 371. But see *Goddard v. Foster*, 17 Wall. 123; *Wood v. Carl*, 4 Met. 203; *Ayer v. Tilden*, 15 Gray, 178.

⁵*Davis v. Coleman*, 8 Ired. 424. In *Austin v. Imus*, 23 Vt. 286, it was held that as between the parties to a promissory note, executed in the state of New York and made payable generally, interest should be allowed at Vermont rate, if it appears from the circumstances attending the execution of the note that it was the expectation and intention of the parties that it would be paid in the latter state. See *Thompson v. Ketcham*, 8 John. 189.

state, by a resident of the state of Illinois. The acceptance was for the accommodation of the drawer, and for the purpose of being afterwards negotiated by the drawer, to raise funds to be used by him in his business in Illinois, and he to provide for its payment. After acceptance, the acceptor placed the bills in the hands of the drawer, and he negotiated the same for a greater rate of discount than was allowed by the laws of either state. It was held to be governed by the laws of Illinois. Strong, J., said. "The case is exactly the same as it would be if the defendants had been residents of Chicago, where the draft was drawn, and had accepted it at Chicago for the accommodation of the drawer, designating New York as the place of payment. It is plain, therefore, that the contract is an Illinois contract, and that the rights and liabilities of the parties must be determined according to the laws of that state." It was treated as a controlling fact that before the acceptance had any operation, before the instrument became a bill, the defendants, who were the acceptors, sent it to Illinois for the purpose of having it negotiated in that state.¹

THE LIABILITY OF DRAWER OR INDORSERS FOR INTEREST AS DAMAGES.—When not fixed by the contract, it is governed by the law of the place where the contract of the drawer or indorser is made; for the contract of these parties is implied, and the implication is that it is to be performed at the place where it is made.²

NOTES AND BILLS ARE BY DEFINITION PAYABLE ONLY IN MONEY.—Within the domain of the law merchant there are a great variety of moneys made legal tender by many sovereignties, and in many jurisdictions are other currencies not legal tender, but which, to considerable extent, perform the functions of money by being freely paid and received as a substitute in all local transactions.

When an instrument in the form of a note or bill is payable in some special currency, the question has often arisen whether it was payable in money. The determination of this question

¹ *Tilden v. Blair*, 21 Wall. 241.

Boyce v. Edwards, 4 Pet. 111. See

² *Gibbs v. Fremont*, 9 Exch. 25; ante, vol. 1, pp. 635, 636.

in the affirmative places the instrument in the category of commercial paper; but if decided in the negative, it belongs to another class of contracts which are not governed by the law merchant. The currency payable in order to give the contract the qualities of negotiable paper must be money not in the popular sense merely, but money which entitles the holder to legal tender currency.¹ Notes payable in current bank notes

¹ Black v. Ward, 27 Mich. 191. A note made and indorsed in Michigan and payable "in Canada currency," was held to be payable in money, and therefore negotiable. Campbell, J., said: "The indorser's contract being governed by the laws of this state, and the note having been made here, its negotiability must in our courts be tested by our statute; but as that is like the statute of Anne, in requiring the paper to be payable in *money*, the only inquiry in this regard is what may be included in that term. It will be found by examining the authorities, that the word 'money' has been used for some purposes in a very wide sense, and for others in a restricted sense. When questions have come up in construing negotiable paper, it has never been extended beyond coin and paper at par value. In England, in the case of Miller v. Race, 1 Burr. 452, which involved the rights of holders of stolen Bank of England bills, the language of Lord Mansfield and of the judges was so pointed in treating such notes as cash, that if the question now discussed had been mooted, there can be little doubt how it would have been decided. A series of decisions, made afterwards, sustained tenders in such bills, where no objection had been made, to the medium in which the tender was made. Polglass v. Oliver, 2 Crompt. & J. 15, 16; Brown v. Saul, 4 Esp. 267; Wright v. Reed,

3 T. R. 554. And these decisions have been followed universally in this country.

"The first time when the negotiability of a bill payable in Bank of England notes came up for decision was in the interval between 1797 and 1818, during which the bank was restrained from making specie payments. The statutes containing this restriction provided that if the amount of any debt were tendered in notes the debtor should not be arrested on the debt. Tomlin's Law Dic. 'Bank of England.' It was held in Grigby v. Oakes, 2 B. & P. 526, that under this statute notes were not a legal tender. Reference was made by some of the court to the peculiar terms of the statute, as limiting the effect of the tender to an exemption from arrest. In Ex parte Davison, Buck, 31, and Ex parte Joneson, 2 Rose, 225, it was held that notes payable in 'cash or Bank of England notes' were not negotiable. In 1834, the notes were made a legal tender; but by the present law they are not such in Scotland or Ireland. Fisher's Dig. 'Bank of England,' 'Tender.' No case has since been reported in which any such question was raised; and whether the silence of the courts arises from the change of the law, whereby the notes are made equivalent to coin, or from any custom excluding any mention of notes in drawing up negotiable paper, we

have no means of judging. Where the notes are always convertible and at par with gold, and are a legal tender, there does not seem to be any very good reason for holding a bill payable in notes to be any more objectionable than one payable in coin. In this country all paper not payable expressly in gold is impliedly payable in greenbacks; and we cannot conceive that it can change the legal character of any security to express in it precisely what the law implies. Where a promissory note is payable in anything which is not a legal tender, the authorities are generally, though not universally, against its negotiability. In New York and Ohio, bank bills issued under state authority, and where the courts hold they are bound to recognize their quality judicially, have been held at par to represent money. So that notes payable in cash, or in such notes, have been adjudged negotiable. *Keith v. Jones*, 9 John. 120; *Judah v. Harris*, 19 John. 144; *Swetland v. Creigh*, 15 Ohio, 118. But in the same states, paper payable expressly in any other bills, or in the bills of specified banks of the state, has been held not negotiable. *Leibe v. Goodrich*, 5 Cow. 186; *Shamokin Bank v. Street*, 16 Ohio St. 1; *Thompson v. Sloan*, 23 Wend. 71; *Little v. Phoenix Bank*, 2 Hill, 425; 7 Hill, 359. Elsewhere, except where there are statutes to the contrary, there is no considerable support for the doctrine, that paper payable expressly in the bank notes of private corporations is negotiable.

"Under the laws of this state, bank bills may be levied on, and may be paid over as cash, if the creditor is willing to receive them; but if he refuses, they must be sold 'as other chattels.' Comp. L. §§ 6096, 6456.

"If the term 'Canada currency' should be confined to private bank notes, it would be difficult to hold this paper negotiable. In *Thompson v. Sloan*, the supreme court of New York held that a note payable in Buffalo in 'Canada money,' was not negotiable. This, however, is not, as we think, in accordance with the general current of decision. Judge Story says: 'If it be payable in money, it is of no consequence in the currency or money of what country it is payable; in the currency or money of England, France, Spain, Holland, Italy, America, or any country.' Story on Bills, § 43; *Chitty on Bills*, 153, 158. We cannot, with any propriety, refuse to recognize the right of every country to fix its currency, and it is impossible for any civilized government to exist without some legal standard of money. The only question here is whether a note payable in 'Canada currency' is, or is not, payable in money. It is claimed on the one side, and denied on the other, that the term 'currency' is confined in our usage to paper which is not money. Upon this question many authorities have been cited, and we have examined each of them, with such other references as we have been able to discover, and we are led to the conclusion that there is no foundation for any such doctrine. The only cases in which it has been held that 'currency' does not mean money (except where it has been qualified by some further definition), are certain cases in Iowa and Wisconsin, all of which rest entirely upon decisions where the paper in question was expressly payable in bank notes. None of these decisions supports the idea that 'currency' and 'bank notes' are purely convertible terms, and the inference is

unwarranted, unless founded on what does not appear in any of those decisions. The decision in *Wright v. Hart*, Adm'r, 44 Penn. St. 454, that paper payable '*in current funds at Pittsburgh*' was not negotiable, was also rested, without any further discussion, upon the authority of former decisions applicable to paper payable in bank notes.

"In *Dillard v. Evans*, 4 Ark. 175, the term 'common currency of Arkansas' (in which certain paper was made payable) was held designed to point out a different currency from that which was legal, and to refer to depreciated paper, which was then, in fact, the common medium of business. And in *Farwell v. Kennett*, 7 Mo. 595, it was held that the insertion of the words 'payable in currency,' indicated a design to change the legal import which would have been found had no such words been inserted. And in *Conwell v. Pumphrey*, 9 Ind. 135, the use of the term 'current funds' was held for the same reason an intentional variation. Subsequent decisions in each of those states have either overruled these cases, or so interpreted them as not to make them apply to a case like the one before this court. Réference will be made frequently to these later decisions. With these exceptions, the general course of authority is in favor of the negotiability of paper payable in currency or current funds. And these decisions rest upon the ground that those terms mean 'money,' as the necessity of having negotiable paper, payable in money, is fully recognized. There is, however, some difference in the methods of arriving at this result, and it is proper to refer to the cases which have used careless language, as well as to those which have laid down rules cautiously.

The fact that the bills of sound banks have been received promiscuously with the legal money of the country, has led here, as in England, to remarks from courts, based on the assumption—which is well founded,—that persons usually do not prefer one to the other, and they sometimes speak of payment in either as amounting to the same thing. It is only where the question is directly presented of a tender actually made in one or the other, that discrimination becomes necessary. Thus in *Lacy v. Holbrook*, 4 Ala. 88, where a bill of exchange, payable 'in funds current in the city of New York,' was held negotiable, it was so held because deemed to be payable in cash, in gold or silver coin, 'or its equivalent.' So in *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Langhlin v. Marshall*, 19 Ill. 390; *Swift v. Whitney*, 20 Ill. 144, and *Hunt v. Devine*, 37 Ill. 137, promissory notes or certificates of deposit, payable in 'currency,' were held to be negotiable on the same ground; but there is reference made to the equivalence of bank notes with other money, which are open to the same hyper-criticism that the court confounded real with conventional money. It is to be observed, however, that none of the cases called for any decision as to what would be a legal tender in payment of such notes.

"The decisions of other states are less open to remark. In Arkansas, where the rule is strict in denying negotiability of paper, not payable in money (see *Hawkins v. Watkins*, 5 Ark. 481, and *Dillard v. Evans*, 4 Ark. 175), it was held in *Graham v. Adams*, 5 Ark. 261, that a note payable in 'good, current money of the state,' was negotiable. The court, after some discussion, remarks: 'A

good currency, then, in our opinion, means nothing more than a lawful currency, and that is, current coin of the United States.' In *Wilburn v. Greer*, 6 Ark. 255, it was held a note payable in 'Arkansas money' was payable in current coin of the United States, and therefore negotiable. In *Burton v. Brooks*, 25 Ark. 215, it was held a note payable in 'green-back currency' was payable in the currency of the United States, and not in national or other bank notes, and that the meaning was the same as if it had been made payable in dollars only.

"In *Indiana*, in *Drake v. Markle*, 21 Ind. 433, it was held that the term 'currency' meant money, and that a note payable therein was negotiable. This case practically overrules *Conwell v. Pumphrey*, which, as we have seen, was decided on the assumption that parties never use unnecessary words in making negotiable paper.

"In *Mississippi*, in *Mitchell v. Hewitt*, 5 S. & M. 361, the note was payable in 'currency of the state of Mississippi.' The court say that this phrase 'can only mean that which has been declared to be a legal tender, because currency implies lawful money.' Reference was made to an early *Pennsylvania* case, *Wharton v. Morris*, 1 Dall. 133, where, upon a similar state of facts, it became necessary to define the words of a note. The court there held that 'lawful' and 'current' were synonymous words, and said the 'lawful current money of *Pennsylvania*,' that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of congress. In *Lee v. Biddis*, 1 Dall. 188, it was further held (as must necessarily be

the case if courts are to construe such language), that evidence could not be received to give any other explanation.

"In *Minnesota*, in *Butler v. Paine*, 8 Minn. 324, currency was held to be lawful money; and the following definition from *Bouvier's Law Dictionary* was approved: 'The money which passes at a fixed value from hand to hand; money which is authorized by law.'

"In *Missouri*, where, in an earlier case (*Farwell v. Kennett*, 7 Mo. 595), it had been held, as it has been in *Indiana*, that words of surplusage must have a controlling and repugnant meaning, and that a note payable 'in currency' was not payable in money, it was distinctly held in *Cockrill v. Kirkpatrick*, 9 Mo. 688, that paper payable in 'currency of *Missouri*' was payable in lawful money of the United States, and that *Missouri* money could mean nothing else.

"In *Tennessee* it was held, in *Searcy v. Vance*, Mart. & Y. 225, that paper payable in 'Tennessee money' was only payable in gold and silver, and that these words would not include bank notes. The same state holds paper payable in current bank notes of *Tennessee*, or in such notes generally, not to be negotiable. *Kirkpatrick v. McCullough*, 3 Hump. 171; *Whiteman v. Childress*, 6 Hump. 303; *Simpson v. Mouldeu*, 3 Cold. 429; *McDowell v. Keller*, 4 Cold. 258.

"In *Louisiana* it was held, in *Fry v. Dudley*, 20 La. An. 368, that a bill of exchange payable 'in currency' is payable in legal current money, and a person who receives such a bill for collection is not authorized to receive anything else.

"In *Ehle v. The Chittenango Bank*, 24 N. Y. 548, a dividend, 'payable

in New York state currency,' was held payable in cash. And it was held incompetent to inquire of a cashier what he understood that phrase to mean. The court say: "The term 'New York state currency' must be held to mean what the ordinary signification of these words implies, unless by some general known usage some other technical meaning can be attached to it."

"We have been referred to the case of *Gray v. Worden*, 29 U. C. Q. B. 535, as bearing adversely on this point. That case decides that a note payable 'in Canada bills' is not negotiable, even though construed to mean government legal tender notes. It is based upon the decisions made in England and America relative to paper payable in bank notes, and holds the official notes as mere promises to pay money, and not as money. That doctrine would not be admissible under our legal tender laws. But the case is chiefly relied on for some remarks it contains distinguishing the word 'currency' from 'money.'

"It seems to have been supposed by counsel that this distinction was the same as between bills and money; or, in other words, that currency and bills are synonymous. This is an evident misapprehension. The language used is this: 'There is a difference between money and currency. In *Landsdowne v. Landsdowne*, 2 Bligh, 78. Lord Redesdale said, in 1830: 'There is no lawful money of Ireland. It is merely conventional. There is neither gold nor silver coin of legal currency; nothing but copper. There is no such thing as Irish money; it is Irish currency.' See also *Kearney v. King*, 2 B. & Ald. 301; *Sprowle v. Legge*, 1 B. & C. 16.'

"The distinction which the Canada

court points out is not one between paper and coin, but between the values of money in different countries. In the cases referred to it appears that the difference between the Irish pound sterling and the English pound sterling was such that twelve English pounds were equivalent to thirteen Irish pounds. In like manner, a Canadian pound represents only four-fifths of an English pound, and the old New York pound was but two dollars and a half; the New York shilling being twelve and a half cents, the Canadian shilling twenty cents, and the British shilling taken nominally at about twenty-five cents. The pound in Jamaica is five-sevenths of the English pound. *Scott v. Bevan*, 2 B. & Ad. 78. Judge Story has collected some learning on this subject in *Conflict of Laws*, §§ 308-313. See also *Taylor v. Booth*, 1 C. & P. 286; *Cope v. Cope*, 15 Sim. 118.

"In *Macrae v. Goodman*, 10 Jur. 555; 5 Moore (P. C.), 315 (6 Harr. Dig. 690), a similar consideration came up in regard to 'Holland currency,' where that term was used in a contract made in Guiana, the colonial guilder being different from the Dutch guilder.

"In *Landsdowne v. Landsdowne* the question was whether, under a marriage settlement, a rent charge on lands in Ireland was payable in English currency, that is to say, whether the annuity of three thousand pounds was to be in English pounds sterling or at a less rate. The currencies of Ireland and England have, it is said, been equalized since that decision. But there was not then, as remarked by Lord Redesdale, any Irish coinage, and the difference was merely one of computation."

are not negotiable paper.¹ In an action on such a note or other form of agreement, the plaintiff must prove the value of such bank paper; otherwise it has been held he is not entitled to judgment

¹ Whitman v. Childress, 6 Humph. 303; Looney v. Pinckston, 1 Overt. 384; Childress v. Stuart, Peck, 276; Gamble v. Hutton, id. 130; Lawrence v. Dougherty, 5 Yerg. 435; Kirkpatrick v. McCullough, 3 Humph. 171; Hopson v. Fountain, 5 Humph. 140. In this case, suit was brought on note payable "in current bank money of the state of Mississippi." On the trial the jury were instructed that this does not entitle the holder to the number of dollars specified in it, with interest on it; that the word money had a technical legal meaning, signifying dollars and cents of constitutional currency, to wit, gold and silver. But on error this was held wrong. Reese, J., said: "We cannot consent to the correctness of this definition of the word *money*. It is a generic term, embracing, according to the subject matter of the discourse or writing, every species of coin or currency—guilders, guineas, Napoleons, eagles, and bank notes, as well as dollars. But if its meaning were, as the circuit court holds, when standing alone, *per se*, still, like all other words, its meaning will be modified by accompanying words or phrases. Here the accompanying and qualifying words are, current *bank* money of the state of Mississippi. *Bank money* means that species of money called *bank notes*; and of that species, the parties in this case meant that sort or variety called Mississippi bank notes. They may not be the very best; but at all events they are those about which the parties contracted. The meaning and intention of the par-

ties on the face of the instrument it is not difficult to perceive. Whether, on the grounds of policy, it would originally have been better, in the construction of all such instruments, to have held the word *dollar* to have referred, not to the numerical amount of the bank notes, but to the standard of value, it is now useless to inquire. The principle in cases where it can apply has been long and well established. Society conforms to it in their contracts, and it must be adhered to. The measure of damages in this case is the value of the current Mississippi bank notes when the covenant was payable." Hixon v. Hixon, 7 Humph. 33. In Baker v. Jordan, 5 Humph. 85, in covenant, there was a plea of covenants performed, and no proof was introduced except a note for dollars, payable in current bank notes; and it was held that the jury was warranted in giving a verdict for the number of dollars called for in the note.

Ward v. Latimer, 12 Tex. 438: Action on two notes payable in *cash notes*. The court charged the jury that if "cash notes," at the time the notes sued on were due, were the circulating medium of the country, and were generally the medium of trade through the country, they thereby took the place of money, and were to be considered its equivalent, provided the same value was attached to them by the community generally. Held, not error.

The proper criterion of the value of "cash notes" is not the price at which they were purchasable at the time, in cash, but the value at which

for any sum.¹ And it has been held, if payable in "current bank notes," without any other description, they would be regarded such as are convertible into specie at the counter where they are issued and pass at par in the ordinary transactions of the country.²

they were in the ordinary and general transactions of trade, by the community.

A draft payable in Arkansas money held not a bill of exchange. *Hawkins v. Walkins*, 5 Ark. 481. Nor will debt lie on a note payable in North Carolina bank notes. *Derberry v. Darnell*, 2 Yerg. 451. Bank notes are treated as depreciated currency. *Gamble v. Hatton*. Peck, 130; *Kirkpatrick v. McCullough*, 3 Humph. 171. So current bank notes. A note payable in current bankable funds, though given during the ascendancy of the confederacy for confederate money, held good for the face value in United States currency. *Taylor v. Turley*, 33 Md. 500. And so, in *Williams v. Moseley*, 2 Fla. 304, it was held that a note payable in "current Florida money" is payable in good funds. A note payable in U. S. six per cent. interest-bearing bonds is not a promissory note. *Easton v. Hyde*, 13 Minn. 90. Nor is a note payable in commonwealth bank notes. *Whitchell v. Waring*, 4 J. J. Marsh. 233.

The holder of a check payable in *current funds* may demand current money par funds, money circulating without any discount, and cannot be compelled to take depreciated bank notes. *Mare v. Kupfer*, 34 Ill. 286; *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; *Klauber v. Biggerstaff*, 47 Wis. 551. In *Chicago F. & M. Ins. Co. v. Keiron*, 27 Ill. 501, "*Illinois currency*" received the same construction. In *Marine Bank of Chicago v. Chandler*, 27 id. 325, "current bank notes" received the same.

In *Marine & F. Ins. Co. v. Tincher*, 30 id. 399, and in *Swift v. Whitney*, 20 id. 144, that currency is the same. In *Moore v. Morris*, id. 258, that a good current money is the same. *Trowbridge v. Seaman*, 21 Ill. 101. *McCormick v. Trotter*, 10 S. & R. 94, holds that a note payable "in notes of the chartered banks of Pennsylvania" is not a negotiable note. *Confederate Note Case*, 19 Wall. 548, in "dollars," in a transaction occurring in insurgent states during the war, there was a latent ambiguity. Parol evidence might show to what currency it referred. A general deposit of the bills of the bank receiving it must be repaid at the nominal amount, although current at only one-half their amount at the time of the deposit. *Bank of Ky. v. Wister*, 2 Pet. 318. *State v. Cassel*, 2 Har. & G. 407, bank notes considered as money, and larceny graduated by their nominal value.

¹*McKiel v. Porter*, 4 Ark. 584; *Elliott v. Chilton*, 5 Ark. 181.

²*Id.*; *Pierson v. Wallace*, 7 Ark. 282; *Bizzell v. Brewer*, 9 id. 58. See *Bush v. Canfield*, 2 Conn. 485. In *Baker v. Jordan*, 5 Humph. 485, there was a plea, in covenant, of covenants performed, and no proof was introduced except a note for dollars, payable in current bank notes, and it was held that the jury was warranted in giving a verdict for the number of dollars called for in the note. In *Edwards v. Morris*, 1 Ohio, 239, an obligation to pay in the notes of a specified bank, must be paid in the notes of that bank or

RE-EXCHANGE AND DAMAGES ON BILLS DISHONORED.—A bill of exchange, as its name imports, is generally to exchange a debt or credit due in one place or country for a debt or credit due in another place or country. Therefore, the drawer and indorsers are respectively liable thereon to the holder for all damages sustained by him in consequence of the dishonor of the bill.¹ Among them is to be included a sum sufficient to cover the premium necessary to be paid in re-exchange,² for the engagement of the drawer and indorser of every bill is that it shall be paid at the proper time and place; and, if it be not so paid, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law merchant of Europe authorizes the holder of a protested bill immediately to redraw from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.³ His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and brokers' commission, and the current rate of exchange at the place where the bill was to be demanded or payable, or the place where the bill was drawn or negotiated.⁴

Hence re-exchange is the expense incurred by the bill being dishonored in a foreign country, in which it is payable, and returned to the country in which it was made or indorsed, and there taken up. The amount of it depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he is liable to pay it.⁵ Where a re-exchange bill is drawn, the payment of it fulfils the drawer's or indorser's engagement of indemnity; if not, the holder may sue on the original bill, and will be entitled to recover in that action what the drawer or indorser ought to have paid; that is to say, the amount of the re-exchange bill.

their numerical value in money.
Their price in money cannot be substituted.

¹ Edw. on Bills, *730.

² Id.

³ 3 Kent's Com. 115.

⁴ Id.

⁵ Chitty on Bills, 684.

This is the amount, whether a re-exchange bill be, in fact, drawn or not.¹

¹*Suse v. Pampe*, 8 C. B. N. S. 537. In this case it is explained that the course of business as to the sale and purchase of foreign bills is as follows: When a London merchant has to receive money from a correspondent abroad, he instructs his bill-broker to sell an amount of florins (or whatever is the current coin of the country on which the bills are to be drawn may be) sufficient at the current rate of exchange to raise the amount in sterling money which he has to receive. The rate of exchange is constantly varying; but usually the fluctuations do not amount to much. As soon as the seller (the merchant) knows at what rate of exchange the bills have been sold, he draws them in florins or other foreign money; and then the bills simply entitle the buyer of them to receive so many florins (or as the case may be), and they contain no allusion whatever to the amount of sterling money paid for them. Inasmuch, however, as there is no rate of exchange for foreign bills at Liverpool, or other places in the interior, and as, by reason of the fluctuations in the rate of exchange, merchants at these places do not know at what rate their bills will be sold in London, they are unable to draw them in foreign coin, it is usual to draw such bills in sterling money, but "payable at the exchange as per indorsement." The London correspondent, when he has sold the bill, and knows the amount of foreign money which the buyer is to have, indorses them payable at the agreed rate of exchange; and then the bills are practically turned into bills payable in foreign money.

The action was brought by the indorsee against the indorser of two drafts, similar in form, one of which was as follows:

Liverpool, 21 Feb. 1859. For £750 stg. Four months after date pay this, our first of exchange (second and third not paid), to the order of ourselves, the sum of seven hundred and fifty pounds sterling, at the exchange as per indorsement, value in ourselves, and place to account as per advice from

E. BUSCH & Co.

To Carl Von Thornton, Vienna.

(Second and third of the same date and tenor.)

The following is a copy of the memoranda and indorsements on the second of the set:

In need, with Messrs. F. H. Hametz & Co. First for acceptance with M. G. Molle, 580 Jaquerielle. Pay Messrs. Wilh. Bunge & Co. or order, value in account.

E. BUSCH & Co.

Pay Messrs. Suse & Sebeth, or order, at the exchange of eleven guilders, five cents, new Austrian currency, per pound sterling, value of the same. London, 22d March, 1859.

Pay to the order of Messrs. Kendler & Co. value in account.

SUSE & SEBETH.

The bills were accepted, but protested for non-payment. The particulars of the plaintiffs' claim under the money counts were for sums paid for the draft at its inception and protest charges, as follows:

Messrs. Wilhelm, Bunge & Co.:

£750 0 0	} Bought 22d March.
£490 11 0	

The doctrine of re-exchange is founded upon equitable principles. A bill is drawn, for example, in this country, payable in Paris, in France. The payee gives a premium for it under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now, the payee and holder is entitled to the amount of the bill

	£	s.	d.
Paid March 25th, 1859..	1,240	11	0
Interest to June, 5 per cent.....	16	16	5
Brokerage, 1 per cent..	14	10	
Protest charges fl...3.82			
And.....3.82			
Fl. 7.64			
At fl. 14.5	10	6	
Postages.....	5	4	
	1,258	18	1

The defendants insisted that they were only liable for the value in sterling money of florins, 13,708.7c, on the day the bills became due, with interest and expenses, which at the then rate of exchange would be 952l. 12s. 9d., and this latter sum having been paid into court, the amount in dispute between the parties was 306l. 5s. 4d. The plaintiffs' claim was that the holder had the option of demanding back the sum they had paid for the purchase of the bills, or of having recourse to the *recambio* account, whichever they should find most to their advantage.

Byles, J.: "The main question in this case is this: When a bill drawn and indorsed in England, and payable abroad, is dishonored by the acceptor's non-payment, what is the extent of the indorser's liability to the holder? The defendants contend that the holder is entitled to the amount of the re-exchange, and to neither more nor less. This amount they have paid

into court. The plaintiffs, on the other hand, contend that he (the holder) is entitled, at his option, either to the amount that he gave for the bill in England, or to the re-exchange.

"The solution of this question depends on the contract of the indorser. That contract is an engagement by the indorser, that, if the drawee shall not at maturity pay the bill, he (the indorser) will, on due notice, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract as understood in America. Story on Bills, 107.

"Apply this contract to the present case. The holders are entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. They have, in effect, bought from the indorsers so many Austrian florins, to be received in Vienna on that day. It should seem to follow, that, on non-payment by the drawee, the holders are entitled, as against the indorsers, to so much English money as would have enabled them in Vienna, on that day, to purchase as many Austrian florins as they ought to have received from the drawee, and further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is to draw in Vienna on the indorsers in England a bill at sight for as much English money as

in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying him, at Paris, the principal, with costs and charges; or by paying him in this country those sums, together with the difference in value between the whole sum at

will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin '*recambium*,' in Italian '*recambio*,' in French '*rechange*,' and in English *re-exchange*. The bill itself is called in French '*retraito*.' This bill for re-exchange being negotiated at Vienna, puts into the pocket of the holders at the proper time and place the exact sum which they ought to have received from the drawee. . . .

"If the indorser were held liable for the amount which the indorsee gave for the bill, when the amount is more than the indorsee ought to have paid, the contract of the indorser would be extended; he would be held liable, not merely for the damages sustained by *the breach of the contract*, but for the damages sustained by *the making of the contract*. For, a portion of these damages the holder must have sustained, though the contract had been performed by the drawee paying the bill."

The statement and illustration of the nature of the transaction which gives rise to the question of exchange and re-exchange by counsel, in *De Taslet v. Baring*, 11 East, 265, has been often quoted as apt and comprehensive: "A merchant in *London* draws on his debtor in *Lisbon* a bill in favor of another for so

much in the currency of *Portugal*, for which he receives its corresponding value at the time in *English* currency; and that corresponding value fluctuates from time to time, according to the greater or less demand there may be in the *London* market for bills on *Lisbon*, and the facilities of obtaining them: the difference of that value constitutes the rate of exchange on *Lisbon*. The like circumstances and considerations take place at *Lisbon*, and constitute in like manner the rate of exchange on *London*. When the holder, therefore, of a *London* bill drawn on *Lisbon* is refused payment of it in *Lisbon*, the actual loss which he sustains is not the identical sum which he gave for the bill in *London*, but the amount of its contents if paid at *Lisbon*, where it was due, and the sum that it will cost him to replace that amount upon the spot by a bill upon *London*, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for re-exchange. And it is quite immaterial whether he in fact redraws such a bill on *London* and raises the money upon it in the *Lisbon* market: his loss by the dishonor of the *London* bill is exactly the same, and cannot depend on the circumstance, whether he repay himself immediately by redrawing for the amount of the former bill, with the addition of the charges upon it, including the amount of re-

Paris, and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which would sell at Paris for the sum claimed.¹ The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the countries where the bill is drawn and where it is made payable. Having engaged as drawer or indorser of the bill, that it should be paid when at the place on which it is drawn, he is bound to indemnify the holder for the loss sustained by him in consequence of the non-payment.² He must pay re-exchange according to the course of exchange between the countries through which the bill was actually negotiated.³ It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such permission is implied by the drawer issuing a negotiable instrument, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder being entitled, in case of its dishonor, to redraw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accu-

exchange, if unfavorable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here; but that party is at all events liable to him for the difference; for as soon as the bill was dishonored, the holder was entitled to redraw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market, or exchange afterwards; for, as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavorable to *England* before he redrew; so neither could the party here fairly insist on having

the advantage if the exchange happened to be more favorable when the bill was actually drawn. Where re-exchange has been recovered on the dishonor of a foreign bill, it has not been usual to prove that in fact another bill was redrawn."

See *Bank of the U. S. v. U. S.* 2 How. 711; *Crawford v. Branch Bank*, 6 Ala. 15; *Millish v. Simeon*, 2 H. Bl. 378. See also *Grimshaw v. Bender*, 6 Mass. 157.

¹ *Bank of the U. S. v. U. S.* 2 How. 711.

² *Edw. on Bills*, *734; 2 Dan. on Neg. Inst. p. 396.

³ *Millish v. Simeon*, 2 H. Bl. 378.

mulated re-exchange arising on the successive redrafts, because that results from the negotiability of the document which he has issued.¹

The acceptor, by his acceptance, binds himself to pay the bill, and as to the contents of the bill, his undertaking is the same as though he had made his note for it. He is not liable upon his acceptance beyond, and is, therefore, not liable to the holder for re-exchange. The authorities are not numerous.² Gibson, C. J., thought it a little remarkable that in so commercial a country as America the point had not been raised before; and not less so that it was first decided in England so late as 1810, and with so little remark as to the principle of the decision. It came up on a motion to direct that the master allow the expense of re-exchange on a judgment against the defendant as an acceptor; to which the court barely answered that it could not be done against one who had charged himself by his acceptance with no more than a liability to pay according to the law of his country; and that if he do not, the holder has his remedy against the drawer.³ It has, however, been supposed, in view of certain decisions, that the acceptor is not exempt from the payment of re-exchange, when sued by the drawer after the draft has been returned protested to him, and he has paid such damages.⁴

¹ Thompson on Bills, 445. But see Story on Bills, § 402.

² Watt v. Riddle, 8 Watts, 545.

³ Napier v. Schneider, 12 East, 420. See Woolsey v. Crawford, 2 Camp. 445; Bowen v. Stoddard, 10 Met. 375; Newman v. Goza, 2 La. Ann. 642; Hanrick v. Farmers' Bank, 8 Port. 539; Dawson v. Morgan, 9 B. & C. 618; Van Arsdale v. Boardman, 3 How. Pr. 60; King v. Phillips, Pet. C. C. 350; Armstrong v. Brown, 1 Wash. C. C. 43, 321; Watt v. Riddle, 8 Watts, 545; Bain v. Ackworth, 1 S. C. Const. 107; Sibely v. Tott, 1 McMill. Eq. 320; Edw. on Bills, 733; Chitty on Bills, *686. In Woolsey v. Crawford, which was an action by the payee against the acceptor, it was contended on behalf of the

plaintiff that the defendant was answerable for all the damage that had been suffered by the plaintiff from the bill being dishonored. Lord Ellenborough answered: "You may as well state that by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due."

⁴ Bayley on Bills, p. 456, note. This author says: "It seems rea-

If the acceptor, by force of his acceptance, is liable to the drawer after the latter has been compelled to pay re-exchange, to avoid circuitry, he ought to be liable directly to the holder, who is entitled to recourse for it; but no case has yet occurred in which a claim of this kind has been sustained against the acceptor, except in behalf of the drawer. And in the principal cases in which the drawer has been allowed to recover re-exchange from the acceptor, the obligation to pay such re-exchange has grown out of the special facts of the case;¹ as where money has been advanced for the acceptor at the place where the bills were drawn, and he had authorized his creditor to there draw bills for his reimbursement. On such facts, the debtor, as such, is under a legal obligation to replace the money at the place where it was advanced; and any necessary loss on

sonable that the acceptor should be liable to all parties where he has effects, and to all excepting the drawer where he has not."

Mr. Parsons (1 Par. on N. & B. 650) says: "The acceptor, it is said, is not liable for re-exchange, as he is bound only for the sum he promises to pay, with legal interest. But for this he is bound to the holder; and also to the drawer if he pays the bill. And if the default of the acceptor compels the drawer to pay this bill, and these damages with it, it would seem on general principles, that the drawer's claim on the acceptor should cover the whole amount."

Mr. Daniel (Dan. on Neg. Inst. § 1450) says: "Our view is this: If the drawer authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it, on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from

the dishonor of the bill. If the holder sues the drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he would be held bound for re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions. And as Thompson has well said: 'If the drawer or indorser is liable to such damage to the holder, there seems to be no reason why the acceptor, who is immediately bound to him, should not also be liable for this direct consequence of his breach of contract.'" Thompson on Bills, 447.

¹ Brown v. Stoddard, *supra*.

bills which he directs to be drawn, on account of the difference of exchange, is justly chargeable to him.¹

The later decisions in England, however, upon this subject, tend to support the liability of an acceptor to the drawer for re-exchange, or fixed damages in lieu thereof, as the natural and proximate consequence of the breach of his contract as acceptor.²

¹ *Lanusse v. Barker*, 3 Wheat. 101; *Consequa v. Fanning*, 3 John. Ch. 587; *Coolidge v. Poor*, 15 Mass. 427; *Boyle v. Zacharie*, 6 Pet. 635; *Riggs v. Lindsay*, 7 Cranch, 500; *Francis v. Rucker*, 2 Amb. 672; *Walker v. Hamilton*, 1 DeG. F. & J. 602.

² *Walker v. Hamilton*, supra. The bills in this case were drawn by a factor in Louisiana on his principals in England, by their direction, to cover his advances and commissions; the bills were protested after acceptance, and the drawer had taken them up and paid 10*l.* per cent. damages, according to the laws of Louisiana.

Lord Chancellor (Lord Campbell) said: "I am clearly of opinion that Mr. Hamilton had a right to prove for this 10*l.* per cent. under the deed. It would be a great injustice if he had not. He is employed by (the acceptors) to buy goods for them upon commission, to send these goods to Liverpool, in the United Kingdom, and he is desired by them to draw bills upon them for the price of the goods and commissions, which they undertake to accept and pay. He does buy the goods; he does draw the bills. The bills are accepted, and, when due, are dishonored; and then what is the situation of Mr. Hamilton? He is sued and obliged to pay the amount of 10*l.* per cent. in consequence of a law subsisting in Louisiana.

"As the case was ingeniously put by Mr. Robinson, they asked him to be their surety, and he became their

surety by drawing the bills, and in that character was called on to pay. But a surety has a right against his principals to be recouped what he has paid as surety at their request. Therefore, according to law and justice, this demand ought to be satisfied, and upon this general principle, that it is a damage naturally flowing from the breach of the contract. Where there is a contract, the party who breaks that contract is liable for what may be considered the natural and proximate consequence of that breach of contract. Here was a promise to pay the bills when they became due; that promise was broken; the payment of the 10*l.* per cent. was the natural and direct consequence of that breach of contract, and, therefore, the party to whom that promise was made, and who suffered from that breach of the promise, is very ill-used if he has not a right to be indemnified in respect of the loss which he has thus sustained.

"This reasoning, I think, applies generally to the drawer of a bill in a foreign country or an acceptor in another foreign country, where there may be a re-exchange, or some law giving a fixed sum in payment of exchange: because what is paid under that law, in lieu of re-exchange, is a necessary consequence of the breach of the contract on the part of the acceptor of the bill; and I have no doubt that in an action at law in an English court, it might be recovered, on setting out

WHEN RE-EXCHANGE OR DAMAGES NOT RECOVERABLE.—Re-exchange is not allowed on promissory notes. Where a maker of a note or other debtor, however, has failed to pay moneys in the country where it was payable, and is sued on his contract in another country, he is probably liable not only to the par of exchange in the money of the forum, but to damages

the acceptance, the dishonor, and *per quod*, that the plaintiff was compelled to pay the 10*l.* per cent. to the holder of the bill.

“That seems to me to be the correct principle, and we have the authority of Pothier (Cont. d’ Exchange, par. Dapin, pl. 117) for its being the law of France, and it has been, I believe, since included in the commercial code of the Code Napoleon. (Code de Commerce, liv. 1, tit. 8, § 13.) We have the authority of Story, the great jurist (Story on Bills of Exchange, § 398), who gives countenance to the doctrine; and we have that which Mr. Daniel was unable to cope with, viz.: the express authority of an English court of justice in the case of Francis v. Rucker, 2 Amb. 672, which is expressly in point with the present. It was a case that was well considered by Lord Camden, who so felt the great importance of it, that in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed, so that his opinion might be reviewed, and the opinion of the house of lords, if necessary, taken upon it. His decision, however, was not appealed against. It has, I believe, been considered law ever since, and is, in my opinion, consistent with reason and good sense.

“If there had been subsequent decisions which were at variance with it, we might have been bound by the more recent authorities; but

notwithstanding all the diligence which has been exercised by Mr. Daniel and his learned junior, they have brought no single authority that conflicts with that case; because in *Ex parte Moore*, 2 Bro. Ch. 597, the proof was allowed; some observations were made by Lord Thurlow respecting *Francis v. Rucker*, but he acquiesced in it, and the proof was allowed. In *Napier v. Schneider*, 12 East, 420, a gentleman at the bar asked for a reference to the master as to the amount that was due on a bill of exchange and for re-exchange (not 10*l.* or 20*l.* per cent., or any given percentage), and the court held that the master was not competent to enter into all this calculation. But if it had been a fixed sum of 10*l.* per cent., the master would have had no difficulty; and I am inclined to believe that in such a case, the counsel who made the application would have succeeded, instead of failing. The case of *Woolsey v. Crawford*, 2 Camp. 445, is, at most, a *nisi prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained; and as to this *nisi prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of *Francis v. Rucker*. But the case before us is distinguishable from it, because it is only there said that a claim in respect to re-exchange could not be admitted, and here we

equal to the rate of exchange for obliging the creditor to receive payment at the place of recovery, instead of receiving it at the place appointed in the contract for payment.¹ This liability does not depend on any rule applicable exclusively to commercial paper. Promissory notes may be drawn with an express provision that they are to be paid with exchange on a certain place.²

Where after protest a bill is paid by the acceptor in the country where according to its tenor it was payable, no exchange can be claimed by the holder against a prior indorser or drawer. It is only where the bill is returned home, and there taken up, that this allowance can be demanded. For the injury occasioned by the delay of payment, the law deems the interest an equivalent.³ And where damages are given in lieu of re-exchange, as by the commercial usage of Massachusetts, and as is now the case by express provisions of the statutes of many states, the same principle of exemption applies.⁴ And the payment of one of a set is a payment of all, and a waiver of damages which may have accrued on prior protest of another.⁵ If the

are not upon re-exchange, but upon a liquidated sum of 10% per cent. I do not, therefore, find any authority at all to conflict with the case of *Francis v. Rucker*, and upon that I think we may safely decide in favor of this demand."

Lord Justice Turner said: "I say nothing as to how this case would stand as between a holder and the acceptors, because that is not the case before us; but as between the drawer and the acceptors, in my opinion, there is a liability in the acceptors which would have been provable under a bankruptcy. Therefore the case of *Francis v. Rucker* is distinct upon the point; and I do not think that that authority, after having examined the petition which was presented in the bankruptcy, is confined at all to the special circumstances of the particular case. Whatever the effect of the cases at law

may be, as between the holder and the acceptor, they do not, in my judgment, affect the case as between the drawer and the acceptor; and in my opinion, therefore, our answer must be in the affirmative."

¹*Grant v. Healey*, 3 Sumn. 523; *Scott v. Bevan*, 2 B. & Ad. 98; *Cash v. Kennion*, 11 Ves. 314; *Smith v. Shaw*, 2 Wash. C. C. 167; *Bank of Missouri v. Wright*, 10 Mo. 719; *Lee v. Wilcocks*, 5 S. & R. 48; 1 Par. on N. & B. 664; *Edw. on Bills*, *726.

²*Pollard v. Herries*, 3 B. & P. 335; *Grutacap v. Moullaise*, 2 McLean, 584; *Smith v. Kendall*, 9 Mich. 241; *Leggett v. Jones*, 10 Wis. 34. But see *Atkinson v. Mauks*, 1 Cow. 707.

³*Bangor Bank v. Hook*, 5 Greenlf. 174; *Porter v. Ingraham*, 10 Mass. 88; *Bayley on Bills*, 387.

⁴*Bangor Bank v. Hook*, *supra*; *Page v. Warner*, 4 Cal. 395.

⁵*Id.*

bill is on presentation paid in part and protested for the residue, the re-exchange is confined to the unpaid part, or the damages apportioned thereto.¹ And if paid in part by the acceptor after protest, the damages or claim for re-exchange is discharged *pro tanto*. The damages are incident to the principal. If that be paid, or as far as paid at the place appointed, the incident or accretion, which would otherwise attach to it, ceases.² Collection of the bills from the acceptor by execution has the same effect as payment by him. Nor will this effect be avoided by the fact that the former action against the acceptor was not in the name of the plaintiff, if such action was for his benefit.³

These damages are allowed only to the parties on whose account and at whose risk the remittance is made. Parties receiving a bill as conditional payment of an antecedent debt, and not in satisfaction of the debt, are not entitled to damages.⁴

¹ Laing v. Barclay, 3 Stark. 38.

² Bangor Bank v. Hook, *supra*.

³ Warren v. Coombs, 20 Me. 139.

In New York, by the former rule of damages on bills, the holder of a bill on London and returned protested for non-payment, was entitled to recover from the drawer or indorser there the contents of the bill at the *rate of exchange* at the time of the notice of dishonor, with twenty per cent. damages and interest. *Graves v. Dash*, 12 John. 17 (reversing *Hendricks v. Franklin*, 4 id. 119); *Denstow v. Henderson*, 13 id. 322. And the same rule was applied when the protest was for non-acceptance. *United States v. Barker*, 1 Paine, 156. But in Pennsylvania, the recovery on non-acceptance was only of interest from the time of protest. *Iaen v. La Gaux*, 1 Yeates, 204; *Morris v. Tarin*, 1 Dall. 147.

In *Hargous v. Lahens*, 3 Sandf. 213, a bill in question was drawn in New York on parties in France, and after acceptance was protested for non-payment. Notwithstanding a subsequent part payment by the ac-

ceptor, it was held that the damages by the law of New York on the whole bill were recoverable from the drawers. The holder's right to recover from them, it was held, became perfect on the return of the draft, and that a subsequent part payment had no influence in reducing that fixed and determinate liability. After being so returned, if the bill be sent back to the place of payment, and a partial payment thereon is then made by the acceptor, a tender of the balance due upon the face of the bill is defective if accompanied by the condition that the bill be delivered up without payment or offer to pay the damages. The holders are entitled to retain the bill to enforce their claims for damages against the proper party. He is entitled to his damages on non-payment of the bill, irrespective of the place where he may subsequently receive entire or partial payment of its amount. See *DeRham v. Grove*, 18 Abb. 43.

⁴ *Chapman v. Steinmetz*, 1 Dall. 261; *Keppele v. Carr*, 4 id. 155. In

BY WHAT LAW THE LIABILITIES OF THE PARTIES GOVERNED.—The contracts of the several parties to a bill, as well as to a note, are governed by the laws of the place where they are severally made. Those of the maker and acceptor may be modified by appointing expressly a different place of payment. But the contract of the drawer and indorsers is implied, and those parties are presumed to contract with reference to the law of the place where the instrument is drawn or indorsed, for that is also the place where their several contracts are to be performed.¹ It must therefore often occur that the measure of damages will be different as to the several parties. The liability of the drawer will be governed by the law of the place where the bill is drawn, among other things in respect to interest and exchange, or damages in lieu of it, and each of several successive indorsers may contract several and different liabilities, each being bound according to the law of the place where his indorsement is made.² Re-exchange varies, as must be seen, with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the

this case, Shipper, J., said: "It appears . . . to be settled law, that where a bill of exchange is not paid and received in satisfaction of a debt, due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor, who remits it for acceptance and payment, stands on the footing of an agent only, until the bill is actually paid. Then, in point of justice, it seems but fair to allow every incidental or casual profit and emolument to the party who is exposed to all the hazard and inconvenience of the remittance. . . . He is entitled to damages on whose account and risk the bill is remitted." *Watts v. Willing*, 2 Dall. 100; *Evans v. Smith*, 4 Bin. 366; *Dehers v. Harriot*, 1 Showers, 163; *Brown v. Jackson*, 1 Wash. C. C. 512; *Hopkins v. Kenworthy*, 3 John. Cas. 436; *Thompson v. Robertson*, 4 John. 27.

¹ *Allen v. Kemble*, 6 Moore, P. C. 314; *Gibbs v. Fremont*, 9 Exch. 25; *Freese v. Brownell*, 35 N. J. L. 285; *Bank of U. S. v. U. S.* 2 How. 711; *Hunt v. Standart*, 15 Ind. 33; *Lennig v. Ralston*, 23 Pa. St. 137; *Price v. Page*, 24 Mo. 67; *Page v. Page*, 24 Mo. 596; *Bonedon v. Page*, id. 595; *Kuenzi v. Elvers*, 14 La. Ann. 391; *Raymond v. Holmes*, 11 Tex. 54; *Everett v. Vendryes*, 19 N. Y. 436; *Slocum v. Pomroy*, 6 Cranch, 221; *Cook v. Litchfield*, 5 Seld. 279; 5 Sandf. 330; *Dow v. Rowell*, 12 N. H. 49; *Aymar v. Sheldon*, 12 Wend. 443; *Yeatman v. Cullen*, 5 Blackf. 246; *National Bank of Mich. v. Green*, 33 Iowa, 140; *Trabue v. Short*, 18 La. Ann. 257; *Short v. Trabue*, 4 Met. (Ky.) 299; *Dundas v. Bowler*, 3 McLean, 400; *Williams v. Wade*, 1 Met. 82; *Artisans' Bank v. Park Bank*, 41 Barb. 602.

² 1 Daniel on Neg. Inst. p. 683.

money market. In some instances, owing to peculiar circumstances, re-exchange has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the states of the Union have by legislation or commercial usage substituted a certain amount of damages on protested foreign bills in lieu of re-exchange.¹ Chief Justice Parsons² said: "According to the law merchant, uncontrolled by any local usage, the holder is entitled to recover the face of the bill, and the charges of the protest, with interest from the time when the bill ought to have been paid, and also the price of re-exchange, so that he may purchase another good bill for the remittance of the money, and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent. of the bill which it is here the usage to pay. But the damages established by the law merchant is, in our opinion, absolutely controlled by the immemorial usage in this state. Here the usage is to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on these sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient that we cannot trace its origin; and it forms part of the law merchant of the commonwealth. Courts of law have always recognized it, and juries have been instructed to govern themselves by it in finding their verdicts. . . . The origin of this usage was probably founded in the convenience of avoiding all disputes about the price of re-exchange, and to induce purchasers to take the bills by a liberal substitution of ten per cent. instead of a claim for re-exchange."³

¹ Bank of U. S. v. U. S. 2 How. 711; Lennig v. Ralston, 23 Pa. St. 137.

² Grimshaw v. Bender, 6 Mass. 157.

³ In Hendricks v. Franklin, 4 John. 119, Spencer, J., said: "The right to recover twenty per cent. damages

on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions. In Great Britain (2 H. Bl. 378) there is no such usage, and hence there the difference of exchange is

The damages allowed now in this country are regulated generally by statutes; these establish different rates in different

always taken into consideration, and their courts of justice allow the usual rates of re-exchange upon the protest of a foreign bill. In Pennsylvania, as early as the year 1700, the legislature enacted that if any person within that province should draw or indorse any bill of exchange upon any person in England or other parts of Europe, and the same be returned back, with a legal protest, the drawer and all concerned should pay the contents of the bill, together with twenty per cent. advance for the damages thereof in the same specie as the bill was drawn, or current money of that province equivalent to that which was first paid to the drawer or indorser. It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill was originally co-extensive with the rule thus established in Pennsylvania, and that the same reason induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant uncertainty and fluctuation of exchange. If these were not the inducements to the allowance of such heavy damages as twenty per cent., I confess myself unable to discover them. It certainly could not be intended merely as a mulct, nor with any other view than to remunerate the party for all his damages in being disappointed in the honoring of his bill."

Morris v. Stokes, Mart. & Hayw. 4. This was a default and inquiry. The court ruled that evidence might be given of the difference of exchange between this country and

Philadelphia, and in the charge (as bills had not been usually drawn in Edenton, and no one knew the exchange) the court said to the jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

In New York, the holder is entitled to recover not only the twenty per cent. damages, together with the interest and charges, but also the amount of the bill liquidated by the rate of exchange, or price of bills on England, or other places of demand in Europe, at the time of the return, and notice to the party to be charged. 3 Kent's Com. 115-117; *Denston v. Henderson*, 13 John. 321; *Graves v. Dash*, 12 id. 16; *Hendricks v. Franklin*, 4 id. 119; *Scotfield v. Day*, 20 id. 102; *Bank of Chenango v. Osgood*, 4 Wend. 607; *Wendell v. Washington & W. Bank*, 5 Cow. 161.

Appleton, C. J., in *Wood v. Watson*, 53 Me. 300 (1865), said: "Damages given on foreign bills of exchange, for non-payment, are as much part of the contract as interest. *Bank of U. S. v. United States*, 2 How. (U. S.) 711, 737. The percentage allowed by statute on the protest of a foreign bill is a commutation for interest, damage, and re-exchange. It is a statutory liquidation of damages, by which the parties are to be governed. *Lloyd v. McGarr*, 3 Barr (3 Pa. St.), 482. Now mercantile usage has established the damages on bills on London, in case of dishonor, in Massachusetts, as determined in *Grimshaw v. Bender*, 6 Mass. 157; and in this state, in *Snow v. Goodrich*, 14 Me. 235, at ten per cent., instead of re-

states, and in some instances give damages on inland bills. In a note the substance of the later statutes of nearly all of the states and territories is given.¹

exchange. This usage forms part of the law of the state. It had been of so long continuance that, in 1809, when the judgment of the court in *Grimshaw v. Bender* was pronounced, Mr. Chief Justice Parsons said that its origin could not be ascertained. It must, therefore, be deemed a part of the law merchant, and as obligatory as any portion of the common law, until it shall be modified or changed by the legislature. Whether the rule of damages is established by statute, or by a long continued usage, having the force of law, it is to be deemed part of the contract of indorsement. The rule referred to, not having been altered by the liquidation, must be regarded as remaining in full force. It is not for the court to change the law whenever a monetary crisis occurs." See *Bowen v. Stoddard*, 10 Met. 375.

In *Fieske v. Foster*, 10 Met. 597, it was held that a statute of Maine which enacts that in an action on a bill drawn or indorsed in that state, payable in Massachusetts, and protested for non-payment, the holder shall recover three per cent. damages, in addition to the contents of the bill and interest, does not entitle the holder to recover those damages in the courts of the latter state. Dewey, J., said: "We can give no effect to that statute in an action instituted here."

¹Alabama: Five per cent on the amount drawn for, whether the bill be inland or foreign, or whether protested for non-acceptance or non-payment. Rev. Code 1867, §§ 1845-1846.

Arkansas: On protested bills drawn

or negotiated in the state, if payable in the state, two per cent. If payable in Alabama, Louisiana, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, or Missouri, or any point on the Ohio river, at the rate of four per cent. If payable at any other place in the United States, five per cent. If payable at any post or place beyond the limits of the United States, ten per cent. If accepted and protested for non-payment, when drawn by a person without the state and within the United States, six per cent.; and if drawn by a person without the United States, ten per cent. These damages are in addition to expense of protest, and interest at the rate of ten per cent. per annum on the amount specified in the bill. Gould's Dig. ch. 25, pp. 208, 210.

Arizona: On bills protested for non-payment, if drawn on a person in the United States or territories east of the Rocky Mountains, fifteen per cent. If drawn upon any person in any place in Europe or other foreign country, twenty per cent., and the damages are in lieu of interest, charges of protest, and all charges to notice of non-payment, interest on the principal and damages from the time of protest are recoverable. Comp. Laws 1877, ch. 78, §§ 12, 13.

California: For interest accrued before notice of dishonor, re-exchange, expenses, and all other damages in favor of holders for value only, on non-acceptance or non-payment of any bill drawn or negotiated in the state, damages are given as follows: On bills drawn upon any person within the state,

two per cent.; drawn upon any person out of the state, and in any of the United States west of the Rocky Mountains, five per cent.; drawn upon any person in any of the United States east of the Rocky Mountains, ten per cent.; drawn upon any person in a foreign country, fifteen per cent. Upon the amount of the bill including damages, interest is allowed from the time of the dishonor. Civil Code, §§ 3234-3236. See *Pratalongo v. Larco*, 47 Cal. 379.

Colorado: On foreign bills, or those drawn upon any person out of the state, on non-acceptance or non-payment, ten per cent. with legal interest from the time the bill ought to have been paid, and costs of protest. General Statutes, 1877, §§ 88, 89.

Connecticut: On protest of a bill of exchange drawn on a person in the city of New York, two per cent. on the principal sum; drawn on a person in the states of New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, New York (except the city), New Jersey, Pennsylvania, Delaware, Maryland, or Virginia, or in the district of Columbia, three per cent.; drawn upon a person in the state of North Carolina, Ohio, Illinois, Indiana, Michigan, Kentucky or Georgia, five per cent.; drawn upon a person in any other state, territory or district of the United States, eight per cent. Such damages stand in the place of interest and all other charges to the time when notice of protest is given, and demand of payment made, and such damages are to be determined without reference to the rate of exchange. R. S. 1875, p. 344.

Dakota: On bills drawn upon any person in the territory, two per cent.; on any person in the states of Ne-

braska, Iowa, Minnesota, Wisconsin, Illinois and Missouri, or in the territory of Montana, three per cent.; on any person in any other of the United States or territories, five per cent.; on any person in any place in a foreign country, ten per cent.; and from the time of notice of dishonor and demand of payment, lawful interest upon the aggregate amount of the principal. Rev. Codes, 1877, § 1925.

Delaware: On bills drawn on a person beyond the seas and returned unpaid with legal protest, twenty per cent. Rev. Code (1874), p. 356; § 3.

Florida: On foreign protested bills, five per cent. Thompson's Dig. Laws of Florida, 349.

Georgia: On any bill protested for non-acceptance or non-payment, payable out of the state and within the United States, five per cent. on the principal, in addition to interest and protest fees; if payable without the limits of the United States, ten per cent. Code (1873), §§ 2792, 2793.

Illinois: On protested bills, payable without the United States, ten per cent. in addition to principal, interest and costs of protest, and when payable at any place within the United States, but out of the state, five per cent. in addition to principal, interest and costs of protest. R. S. 1874, 718.

Idaho: On bills drawn on any person in any of the states or territories west of the Rocky Mountains, including Utah and Montana, twenty per cent.; on any person east of the Rocky Mountains, in the United States, twenty-five per cent.; on any person in the British possessions in North America, west of the Rocky Mountains, including Vancouver's Island, twenty-five per cent.; upon any person in any foreign country,

thirty per cent. Rev. Laws, 1875, p. 654, § 12.

Indiana: On protested bills, drawn or negotiated within this state, payable out of the state and in the United States, five per cent.; payable out of the United States, ten per cent. on the principal sum. Beyond such damages, no interest or charges, accruing prior to protest, allowed; but interest may be recovered from the date of protest; but no damages beyond cost of protest, if, upon notice of protest and demand of principal, the same be paid. And a holder, to recover damages, must have paid value. Statutes (1876), vol. 1, p. 636 §§ 7, 8, 10.

Iowa: On bills drawn or indorsed in this state, upon a person out of the United States, or in California, Oregon or Nevada, or any of the territories, five per cent. on the principal sum, and interest may be computed on the same from the time of protest; drawn upon a person out of the state, in any other place in the United States, three per cent. with interest. McClain's Statutes (1880), vol. 1, § 2096.

Kansas: On all bonds, notes and bills negotiable by the act, drawn for the payment of any sum of money legally protested for non-acceptance or non-payment, the drawer or drawers, indorser or indorsers, maker or makers, obligor or obligors, shall be subject to the payment of six per cent. damages, if drawn upon any person within or without the jurisdiction of the United States and beyond the limits of the state; and interest at the rate of seven per cent. from the date of protest until paid, unless a different rate is stipulated in such bill, note or bond; but no person residing within the state is liable for protest damages. Comp. Laws, 1879, p. 129, § 14.

Kentucky: Bills drawn on any person out of the United States, and protested for non-payment or non-acceptance, bear ten per cent. per annum interest from the day of protest, for not longer than eighteen months. Such interest is recovered up to the time of judgment, which bears legal interest. Gen. St. 1874, 250.

Louisiana: The rate of damages to be allowed upon the usual protest for non-acceptance or non-payment of bills of exchange drawn or negotiated in this state is, on bills drawn on and payable in foreign countries, ten per cent.; on all bills drawn on and payable in any other state in the United States, five per cent. on the principal sum specified in such bill. Damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-acceptance or non-payment, but the holder is entitled to recover lawful interest upon the aggregate amount of the principal sum, and of the damages thereon from the time at which notice of protest for non-acceptance or non-payment shall have been given and payment demanded. When the contents of the bill are expressed in the money of the United States, the amount of the principal and of the damages is ascertained, without any reference to the rate of exchange; but when expressed in foreign currency, the principal and damages are determined by the rate of exchange; but when the value of such foreign coin is fixed by the laws of the United States, the value thus fixed must prevail. Statutes, 1870, vol. 1, pp. 255, 256.

Maine: Damages on protest of bills of exchange of a hundred dollars or more, payable by the ac-

ceptor, drawer, or indorser of one in this state, are, if payable at a place seventy-five miles distant, one per cent.; if payable in the state of New York, or in any state northerly of it, and not in this state, three per cent.; if payable in any Atlantic state or territories, southerly of New York and northerly of Florida, six per cent.; and in any other state or territory, nine per cent. R. S. 1871, ch. 82, pp. 643, 644, § 35.

Maryland: The holder of a bill of exchange, drawn in the state, on any person in a foreign country, regularly protested, is entitled to recover so much current money as will purchase a good bill of exchange, if the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum, with costs of protest and legal interest; if drawn on any person in any other of the United States, and protested, the holder may recover in the same way a sum sufficient to buy another bill of the same tenor, and eight per cent. damages on the principal sum, and interest from the time of protest, and costs. It is also provided that indorsers of such bills, who shall have paid the principal and the damages prescribed by statute, may recover the same, with interest from the drawer, or any other person liable to him on the bill. Revised Code, 1878, pp. 295, 296. The indorser of a bill, remitted to his original character as holder and payee, cannot recover under the last section of this statute, but only as holder. *Bank of U. S. v. U. S.* 2 How. 711; 1 Par. on N. & B. 657-8, note.

Massachusetts: The holder of bills drawn or indorsed in the state, and payable without the United States,

duly protested for non-acceptance or non-payment, are entitled to the current rate of exchange at the time of the demand, and five per cent. on the contents thereof, and interest on the contents from the date of the protest. The amount of contents, damages and interest are in full of all damages, charges and expenses, in the above cases. If the bill is payable within the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut or New York, two per cent.; New Jersey, Pennsylvania, Maryland or Delaware, three per cent.; Virginia, West Virginia, North Carolina, South Carolina, or Georgia, or the District of Columbia, four per cent.; if in any other of the United States, or the territories thereof, five per cent. If the bill is for a sum not less than one hundred dollars, and payable within the state, at a place not less than seventy-five miles from the place where drawn or indorsed, one per cent. in addition to the contents thereof, and interest on the contents. Gen. Stats. 1882, p. 428, §§ 18, 20, 21.

Michigan: Damages on bills duly protested, in addition to the contents of the bill and interest and costs: On bills payable at any place without the state, but within the territory of Wisconsin, or either of the states of Illinois, Indiana, Pennsylvania, Ohio or New York, three per cent. on the contents of the bill; if payable within either of the states of Missouri, Kentucky, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, or the District of Columbia, five per cent.; and if payable elsewhere within any of the United States, or the territories thereof, ten per cent. If the bill is payable without the limits of the United States,

the holder may recover the same, with the current rate of exchange at the time of the demand, and damages at the rate of five per cent. upon the contents thereof, together with interest on said contents from the date of protest; said sum to be in full of damages, charges, and expenses. Comp. L. 1871, p. 516.

Minnesota: Damages on protested bills, payable without the limits of the United States, are the bills with the correct rate of exchange, at the time of the demand, and ten per cent. on the contents, with interest on the contents, from the time of protest, to be in full of all damages, charges and expenses. If the bill is drawn on any person in the United States, but out of the state, five per cent. damages, together with costs and charges of protest, besides the amount of the bill and legal interest. Stats. 1878, p. 317.

Mississippi: Damages on bills drawn on any person out of the state, but within the United States, five per cent. on the amount, besides interest on the same; out of the United States, ten per centum, besides interest, and the holder is also entitled to all costs, and the charges of protest. No damages on domestic bills. Rev. Code, 1880, p. 331.

Missouri: When any bill of exchange is expressed to be for value received, drawn and negotiated within the state, is duly presented for acceptance or payment, and protested for non-acceptance or non-payment, the drawer and indorsers, having due notice of the dishonor, are required to pay damages as follows: If drawn on any person at any place within the state, four per cent. on the principal sum. If drawn on any person out of the state, but within the United States or the territories, ten per cent. If

drawn on any person without the United States, or the territories thereof, twenty per cent. If accepted and not paid, the damages allowed are four per cent., if drawn by any person within the state, and if drawn by any person without the states or territories, ten per cent. If it is expressed to be paid in the money of the United States, the amount due and damages are to be determined without reference to the rate of exchange between this state and the place on which it is drawn. If in the money or currency of any foreign country, then the amount due, exclusive of damages, is to be ascertained by the rate of exchange, or the value of such foreign currency at the time of payment. Rev. Stats. 1879, pp. 84, 85.

Nebraska: Bills of exchange legally protested for non-acceptance or non-payment, subject to twelve per cent. damages thereon, if drawn upon any person without the United States, and six per cent. damages if drawn upon any person within the United States, and without this state. Stats. 1881, p. 310.

Nevada: Bills drawn upon any person in any of the United States east of the Rocky Mountains, fifteen per cent.; if upon a person in any foreign country, twenty per cent. Such damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-payment; but the holder is entitled to recover lawful interest upon the principal sum specified in such bill, and damages thereon from the time of giving notice of protest. Comp. Laws, 1873, §§ 20, 21.

New York: Damages on protest of bills of exchange drawn or negotiated within the state are as follows:

1. If the bill is drawn upon any

person at any place in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Ohio, Delaware, Maryland or Virginia, or in the District of Columbia, three per cent. upon the amount.

2. If it is drawn upon any person at any place in either of the states of North Carolina, South Carolina, Georgia, Kentucky or Tennessee, five per cent.

3. If it is drawn upon any person in any other state or territory of the United States, or in any other place on or adjacent to this continent and north of the equator, or in any place in the West Indies, or elsewhere in the Western Atlantic Ocean, ten per cent.

4. If drawn upon any person in Europe, ten per centum. Such damages to be in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of non-payment; but the holder may recover, in addition to such damages, interest upon the aggregate amount of the principal sum, and the damages aforesaid, from the time notice of protest shall have been given and payment demanded.

5. If the contents of the bill are expressed in the money of the United States, the amount due thereon and the aforesaid damages shall be determined without reference to the rate of exchange.

6. If it is expressed as payable in the money or currency of a foreign country, then the amount due, exclusive of the damages aforesaid, shall be ascertained by the rate of exchange, or the value of such foreign currency at the time of the demand of payment.

7. Damages on non-acceptance are the same as afore stated in reference

to non-payment, and are in lieu of interest, charges of protest and all other charges previous to and at the time of giving notice of non-acceptance. But the holder shall be entitled to recover interest upon the aggregate amount of the principal and damages thereon from the time of protest.

8. The damages above specified are only recoverable by the holder of a bill, who shall have purchased the same, or some interest therein, for a valuable consideration. St. at Large (Edmonds), pp. 723, 724.

New Mexico: On bills drawn upon a person out of the United States, twelve per cent. upon the principal sum, with interest on the same from the time of protest; if upon a person in any of the United States or territories thereof, six per cent., with interest. Gen'l Stats. 1880, p. 63.

North Carolina: The damages on protested bills of exchange, drawn or indorsed in this state, are as follows: For bills upon any person in any other of the United States, or in any of the territories thereof, three per cent.; for bills payable in any other place in North America (excepting the northwest coast of America), or in any of the West India or Bahama Islands, ten per cent., for bills payable in the islands of Madeira, the Canaries, the Azores, the Cape de Verde Islands, or in any other state or place in Europe or South America, fifteen per cent; if payable in any other part of the world, twenty per cent. on the principal sum. Battle's Rev. Code, 1873, ch. 10, pp. 103, 104.

Oregon: On bills drawn or indorsed within the state, and payable out of the United States, duly protested for non-acceptance or non-payment, the current rate of ex-

change at the time of demand, and damages at the rate of ten per cent. upon the contents, together with interest on the said contents from the date of protest. On bills within the United States, out of the state, the damages are five per cent., with legal interest, costs and charges of protest. Comp. Laws, 1872, pp. 718, 719.

Ohio: No damages are allowed by statute now on bills drawn or negotiated in this state. The former statutes provided twelve per cent. damages when any bill was legally protested for non-acceptance or non-payment, if drawn on any person without the jurisdiction of the United States; and six per cent. if drawn on any person within the jurisdiction of the United States and without the jurisdiction of that state, and that such bills should in all cases bear six per cent. interest from the date of the protest until paid. But no damages were allowed if there was an agreement or understanding that the bill might be paid at any other place than that on which it was drawn. Swan's R. S. Derby's ed. 1854. 576. In *Farmers' Bank v. Brainerd*, 8 Ohio, 292, a bill drawn upon a person in Ohio payable in New York, and protested for non-payment, it was held did not entitle the holder to six per cent. damages for protest. And in *Commercial Bank v. Reed*, 11 Ohio, 498, six per cent. damages on a protested bill addressed by mistake to the defendant in Ohio, instead of Philadelphia, where the bill was payable, cannot be recovered back, nor be set off against a subsequent claim, if paid with a full knowledge of the facts.

Pennsylvania: The holder of bills of exchange drawn or indorsed in this state, and returned unpaid with

a legal protest, may receive and recover from the drawer or indorser the damages hereafter specified over and above the amount of the bill and the charges of protest, with interest thereon from the time of protest and notice; that is to say, if such bill shall have been drawn upon any person in any of the United States or the territories thereof, except Upper and Lower California, New Mexico and Oregon, five per cent.; for bills payable in these excepted states and territories, ten per cent.; for bills payable in China, India, or other parts of Asia, Africa, or islands in the Pacific Ocean, twenty per cent.; for bills upon Mexico, the Spanish Main, West Indies, or other Atlantic islands, east coast of South America, Great Britain, or other places in Europe, ten per cent.; for bills upon places on the west coast of South America, fifteen per cent.; and for bills upon any other part of the world, ten per cent. upon such principal sum. The amount of such bill, and of the damages payable thereon, is ascertained by the rate of exchange, or value of the money or currency mentioned in such bill at the time of notice of protest and demand of payment. Purdon's Dig. 1873, pp. 158, 159; acts 1821 and 1850. See *Watts v. Riddle*, 8 Watts, 545. The act of 1849 allows bills to be drawn payable in particular funds with the current rate of exchange in Philadelphia, or any other place in the state, and leaves the parties to specify, as they might do at common law, the rate of damages to be recovered on the bill. Dunlop's Comp. 1156-7.

Rhode Island: Damages on protested bills returned for non-acceptance or non-payment from any place without the United States, ten

STIPULATIONS FOR ATTORNEY FEES AND COSTS.—Notes are not unfrequently drawn to include not only an increased rate of

per cent., besides charges of protest. After protest, six per cent. interest. On bills drawn on parties in other states of the United States, returned under protest, five per cent., and charges of protest, besides interest from the time of protest. Pub. St. 1882, pp. 342, 343.

South Carolina: Damages on protested bills drawn upon persons in the United States, but out of this state, ten per cent.; on all bills drawn on persons in any other portion of North America, or within any portion of the West India Islands, twelve and a half per cent.; if drawn upon any person in any other part of the world, fifteen per cent., besides the charges incidental thereto, and lawful interest until payment. Rev. St. 1873, 321.

Tennessee: Damages on protested bills drawn on persons out of the state, but within the United States, three per cent.; drawn on any person in any other state or place in North America bordering on the Gulf of Mexico, or in any of the West India Islands, fifteen per cent.; drawn on any person in any other part of the world, twenty per cent. These damages are in lieu of interest, and all other charges except charges of protest to the time when the notice of protest and demand of payment shall have been given; but interest is to be computed from that time on the aggregate of principal, damages and charges of protest. Thompson & Steger's Comp. S. L. 1871, §§ 1963, 1964."

Texas: Damages on protested bills drawn on persons being beyond the limits of the state, are ten per cent. on the amount of the bill, with interest and costs of suit, and the pro-

vision is confined to drafts drawn by merchants upon their agents or factors. Rev. St. 1879, art. 275.

Virginia: Damages on protested bills, drawn or indorsed within the state and payable without the state, but within the United States, three per cent.; if payable without the United States, ten per cent. Code, 1873, p. 987.

Washington: On bills protested for non-payment, drawn or indorsed within the territory, payable out of the United States, ten per cent.; and if payable out of the territory, but within some state or territory of the United States, five per cent. Such damages are in lieu of interest, and all other charges incurred previous to, and at the time of giving notice of non-payment, but the holder is entitled to receive lawful interest upon the principal, and damages thereon, from the time of giving notice of protest for non-payment. Code of 1881, §§ 2308, 2309.

West Virginia: Damages on protested bills, if payable out of the state and within the United States, three per cent.; if payable out of the United States, ten per cent. Code 1868, p. 537.

Wisconsin: Damages on protested bills, drawn or indorsed in the state, but payable *without the United States*, the current rate of exchange and five per cent. on the contents, and interest on the same from the date of protest, in full of all damages, charges and expenses. If payable out of the state, but in some state or territory of the United States, five per cent., together with charges of protest. Rev. St. 1878, §§ 1682, 1683.

interest, in case of default at maturity, but also attorney fees. These stipulations in notes, as well as in mortgages, have been the subject of some judicial discussion, and some conflict of decision. In Illinois, it is held that a stipulation to pay a specified sum as an attorney fee, if the note be not paid *without suit*, is not recoverable in the suit on the note, because not due until after the suit is commenced.¹ But it is held there to be recoverable if payable on the event of default at maturity, instead of on the event of bringing suit.² In Indiana, such stipulations are maintained for reasonable amounts, and the sums so stipulated, even when payable in the event of a suit, are recoverable in that suit. They are held to be a part of the damages which the maker stipulates to pay in that event, and may be included therein with the principal and interest of the note; they are incident to the main debt, and cannot be sued for in a separate action.³ These stipulations are held good in Iowa and Dakota.⁴ In Ohio and Michigan, such stipulations are held contrary to public policy, and void.⁵ It has also been so ruled in Nebraska.⁶ Where an attorney fee of ten per cent. was stipulated to be paid as liquidated damages, in addition to the principal and interest, in case of collection "by suit at law or otherwise," it was held that this stipulation did not affect the liability of an indorser; the measure of damages as to him, as has been before stated, is the amount paid by the indorsee and interest.⁷ Nor will the insertion of such or a similar stipulation make the note uncertain, and thereby prevent it from being treated as commercial paper. Such additional sum being payable only after default, it adds nothing to the note while it is in cir-

¹ Nickerson v. Babcock, 29 Ill. 497; Easter v. Boyd, 79 id. 325.

² Id.; Dunn v. Rodgers, 43 Ill. 260; Clawson v. Manson, 55 id. 394.

³ Smiley v. Mier, 47 Ind. 559; Roberts v. Comer, 41 id. 475; Wyant v. Pottorff, 37 id. 512; Johnson v. Crossland, 34 id. 334; Matthews v. Norman, 42 id. 176; First National Bank v. Indianapolis, etc. 45 id. 5; Garver v. Pontious, 66 id. 191; Smock v. Ripley, 62 id. 814; Tuley v. McClung, 67 id. 10.

⁴ Williams v. Meeker, 29 Iowa, 292; Nelson v. Everett, id. 184. See Miller v. Gardner, 49 Iowa, 234; Davidson v. Vorse, 52 Iowa, 384; Farmers' Nat. Bank v. Rassmussen, 1 Dak. 60.

⁵ State v. Taylor, 10 Ohio, 378; Shelton v. Gill, 11 id. 417; Bullock v. Taylor, 39 Mich. 137; Myer v. Hart, 40 id. 517.

⁶ Dow v. Updike, 11 Neb. 95.

⁷ Short v. Coffeen, 76 Ill. 245.

ulation as such before maturity; it only attaches after dishonor.¹ It has been treated in Kentucky as a penalty, and although recoverable under appropriate pleading when judgment went by default, yet if resisted by invoking the equitable jurisdiction of the court, relief might be had against it;² but later such stipulations in that state have been held to be against public policy, and void.³ Separate suits may be brought at the same time by an indorsee against the maker and indorsers, and recoveries had against each. And in that case, payment of the debt in one case, with the costs of the same, will not discharge the other judgments; but the costs of each action must be also paid.⁴ An indorser who has been compelled to pay a bill or note by suit against him, cannot recover such costs of prior parties.⁵ But an accommodation party, who has been compelled by suit to pay, may doubtless recover the costs, as well as the face of the paper, from the party whose legal duty it was to provide for and pay it.⁶ After the dishonor of a bill by the acceptor's non-payment, the holder cannot charge the drawer or indorser commissions and expenses paid an agent for subsequently collecting a part of the bill from the acceptor.⁷

¹ Gaar v. Louisville Banking Co. 11 Bush, 180.

² Id.; Thomassen v. Townsend, 10 Bush, 114.

³ Witherspoon v. Musselman, 14 Bush, 214.

⁴ In Wattles v. Laird, 9 John. 326, it appears that separate suits had been brought by the indorsee of a promissory note against the indorser and maker. In the suit against the former, A became special bail. The plaintiff recovered judgment in both actions. Afterwards, a *fi. fu.* issued against the maker, and was returned satisfied. A *ca. sa.* was issued against the indorser, and after return of the execution in the other action, was returned *non est.* In an action of debt on the recognizance of bail, his bail pleaded payment

and set-off of the amount paid by the maker as money paid to his use. It was held that the recognizance being forfeited, the matters pleaded by the defendant could not be set up in bar of the suit on the recognizance, in which a judgment must be given for the penalty; but the defendant might show the payment by the maker in mitigation, so that the damages should be assessed for costs only of the suit against the principals.

⁵ Dawson v. Morgan, 9 B. & C. 618; Simpson v. Griffin, 9 John. 131; Roach v. Thompson, 4 C. & P. 194; Steele v. Sawyer, 2 McCord, 459.

⁶ 1 Par. on N. & B. 662.

⁷ Bangor Bank v. Hook, 5 Greenlf. 174.

VALUE OF NOTES AND BILLS.—Notes against solvent parties, or those able and willing to pay them at maturity, possess value; and this value approximates to the sum they call for, according to the credit and responsibility of the parties liable on them. In Kentucky, Tennessee and some other states, a class of contracts has existed in the form of notes payable in cash—notes of third persons, generally designated as cash-notes of good, solvent men—indicating that such notes were in circulation, in some sort a substitute for money, as a medium of exchange. Contracts so payable have generally been construed as promises to pay the amount specified in notes of the description mentioned, at par value. And for failure to make such payment, the measure of damages recoverable in legal currency is the actual value of the cash-notes when they should have been paid over;¹ not the rate at which shavers purchase them, nor par value. The expense of collecting is to be considered; and the difference made in every day transactions, between them and money, in the sale of property, is the true criterion of value.² The courts said, such commodities as individual promissory notes have no fixed value ascribed to them by law. Money, alone, being the legal standard of values, that alone is, in judgment of law, necessarily equivalent to its actual denominations.³

¹ *Gholson v. Brown*, 4 Yerg. 496; *Murray v. McMackin*, id. 41; *Ward v. Latimer*, 12 Tex. 438.

² *Williams v. Brasfield*, 9 Yerg. 270; *Younger v. Givens*, 6 Dana, 1.

³ *Id.* In *Murray v. Pate*, 6 Dana, 335, upon a verbal agreement for the sale of land by Pate to Tunstall, at the price of \$500, the latter placed in the hands of Murray, the defendant, a single bank note for five hundred dollars, upon a southern bank, to be delivered to the plaintiff upon his making a deed for the land, provided another person designated should say that the plaintiff's title was good; the person so designated having pronounced the title good, a deed was executed by the plaintiff,

and tendered, but refused by both the purchaser and the defendant. Tunstall told the defendant not to pay the money to the plaintiff. The defendant delivered up the money on the purchaser's order and indemnity. The action was for money had and received, and the trial court instructed the jury "that if the \$500 was received in bank paper, but was considered as money, and received as money, and had been used by Murray, then he is liable in this action for it as money." The court of appeals, by Judge Marshall, said: "To the instruction given there are several objections. First. There is no evidence conducing to prove that the bank note

In the absence of any other proof, the jury may infer from the terms, *good notes then due*, that they were to be equal to money, and their verdict so found will stand; for the court cannot judicially know that the assessed value was too high.¹ And a promise to pay a given amount in the note or other pecuniary obligation of the promisor is valued at the amount which would be payable by such note or obligation.²

A party having, as agent, pledgee, borrower, or otherwise, the possession of a note or bill belonging to another, and bound to diligence in collecting it, or to take the proper steps to charge indorsers or other secondary parties, and who is guilty of negligence in the performance of that duty by which the paper becomes worthless, is *prima facie* liable for its amount. His liability is to compensate the actual loss; and it devolves on him to show, if he can, that the paper would be, with the diligence he was bound to exercise, worth less than its face.³ Thus, if A loan the note of a third person to B, the latter must use due diligence to recover the amount due upon it; and if the debt be lost by the insolvency of the maker and by B's want of diligence, he must pay the amount of the note to A.⁴ And the same rule applies in assessing damages for the wrong-

was received as so much money; or that it was used, in any proper sense of that term, by Murray himself; and he being a mere depositary, or stakeholder, of the specific article, could not be liable for more than its value, for failing to deliver it to the person for whose use he held it. Second. The note not having been received *expressly* as money by Murray, nor expressly agreed to be so received by Pate, neither its nominal amount nor its value could have been recoverable in this action for money had and received." 1 Chitty Pl. 385.

¹ Sirlott v. Tandy, 3 Dana, 142.

² In Memphis & Little Rock R. R. Co. v. Walker, 2 Head, 467, a set-off was offered of the following obligation: "Six months from date, or sooner if practicable, the M. & L. R.

R. R. Co. promise to pay to the order of H. & A. \$5,000 in the bonds of said company, *at par*; of equal character with any bonds issued by said company; to bear interest, etc., in part payment of the award made," etc. It was held that on default in paying the obligation, the measure of damages was the nominal value, \$5,000, not the value at which the bonds might be rated in the market. So a general deposit of bills of the bank receiving them must be repaid at the nominal amount, although current at half their amount at the time of the deposit. Bank of Kentucky v. Wister, 2 Pet. 318.

³ Shipsey v. Bowery National Bank, 59 N. Y. 485; Downer v. Madison Co. Bank, 6 Hill, 648.

⁴ Higbee v. Hopkins, 1 Wash. C. C. 230.

ful conversion of a note; that is to say, the face of the note is *prima facie* recoverable; but the defendant may show that it was worthless.¹

It devolves on the plaintiff, suing for want of diligence, to show that the primary party is insolvent; or, in other words, that, by the negligence of the defendant, the paper is of no value.² A recovery may be had for the full amount of the pledgee who converts it to his own use, unless he shows that the promisor is unable to pay the note.³ The same rule of damages applies in favor of a purchaser to whom the defendant has fraudulently sold a note which had been paid. The measure of damages is *prima facie* the amount of the note. The ability of the maker to pay the note will be presumed until the contrary is shown.⁴

But the damages for breach of an agreement to return to the maker a paid or released note, already past due, cannot be the amount of the note, unless it be shown that, in consequence of the breach, the plaintiff has been, by force of the *prima facie* import of the paper, and its apparent negotiability, compelled to pay it to some subsequent holder, in spite of a diligent endeavor to prove the facts which, if proved, would constitute a complete defense.⁵

¹ *McPeters v. Phillips*, 46 Ala. 496.

² *Hough v. Hunt*, 1 Ohio, 504.

³ *Thomas v. Waterman*, 7 Met. 227; 317.

Latham v. Brown, 16 Iowa, 118.

⁴ *Neff v. Clute*, 12 Barb. 466.

⁵ *Barmon v. Lithauer*, 4 Keyes,

CHAPTER III.

VENDOR AND PURCHASER.

Under this general head it will be convenient and appropriate to present consecutively the law of damages applicable to contracts of sale and purchase of both realty and personalty, as well as to the obligations for assuring quality, quantity and title. Those which relate to lands require separate treatment, and will be first considered; then those contracts which relate to things of a personal nature.

The sense and aim of the law in respect to contracts generally are well expressed by Hosmer, C. J., in a Connecticut case: "The rule of damages on the breach of an express contract has long been established; and whether it relate to real or personal estate, it must necessarily be the same. Whenever a person for a legal consideration agrees to do a certain act, and, in the event of his not doing it, the damages are not stipulated by the parties, the law, on the ground of reason and natural justice, implies that the person in default shall pay the damages accruing from the non-performance. The object of the parties ought to be attained as nearly as possible; and that is, that the specific act agreed to be done should be performed. If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing which he contracted to do, and such value to be estimated at the time when the act in question should have been executed."¹ These principles, for the most part, apply to contracts relating to real estate. But an exceptional rule of damages to some extent has been applied, by which, instead of allowing the purchaser, as the injured party, damages equal to the benefit he would derive from performance, the amount allowed him has been fixed on the standard of rescission. This exception does not gainsay the principle of compensation, but is based on considerations of policy; and in this country is treated as an exception.

¹ Wells v. Abernethy, 5 Conn. 222.

SECTION 1.

VENDOR AGAINST VENDEE.

Seller only entitled to purchase price and interest — The equitable remedy — The legal remedy — Proper measure of damages — Where notes are given for the price — The seller must convey a perfect title — Recoupment for a defect of title — Purchaser's possession prevents him from objecting to a defective contract — Where contract does not fix the price — Interest on purchase money.

SELLER ONLY ENTITLED TO PURCHASE PRICE AND INTEREST.—

The utmost pecuniary redress which a vendor may claim against a vendee in respect of a contract of purchase is the purchase price, and interest upon it from the time it became due. Collection of it accomplishes specific performance. Where the promises to convey and to pay are to be performed simultaneously, and are, therefore, mutually dependent, a court of equity will not decree performance against the vendee by requiring him to pay, except upon the terms of the vendor doing equity on his part by making effectual conveyance of the title at the same time according to the contract.¹

THE LEGAL REMEDY.—The theory of the legal remedy on the contract is not that of specific performance; but the recovery of damages commensurate with the injury resulting from non-performance.

There are a few cases in England and in this country in which, on a mere tender of a conveyance not accepted, recovery has been permitted or countenanced at law of the entire purchase money.²

¹ *Gaines v. Bryant*, 4 Dana, 395.

² *Hawkins v. Kemp*, 3 East, 410. There is an implication in favor of such recovery in *Goodison v. Nunn*, 4 T. R. 761, and in *Glazebrook v. Woodrow*, 8 T. R. 366. It was decided that no action for the purchase money could be brought by the vendor without averring that he had conveyed, or *tendered a conveyance*. *Alna v. Plummer*, 4 Greenlf. 258; *Garrard v. Dollar*, 4 Jones' L. 175; *Sanborn v. Chamberlin*, 101 Mass.

409; *Worlley v. Jones*, 11 Gray, 168; *Franchot v. Leach*, 5 Cow. 506; *Tripp v. Bishop*, 56 Pa. St. 424. See *Hansbrough v. Peck*, 5 Wall. 497.

In *Richards v. Elick*, 17 Barb. 260, *Gridley, J.*, expressed disapproval of this rule, but regarding it as settled in New York, allowed recovery accordingly. He says: "It is insisted by counsel for the defendant that the measure of damages assumed in the first court, viz., the purchase price of the land, is not the

PROPER MEASURE OF DAMAGES.—In those contracts providing for concurrent execution by the parties, the contract and its consideration are mutually executory, and neither party is bound absolutely to fulfil without performance on the other side. And each party on general principles has the legal right to violate his contract on the usual terms of compensating the other for the damages which the law allows, and subject to the jurisdiction of equity to decree specific performance.¹ If either can obtain, in a court of law, a judgment which enforces literal performance by the other on a mere proffer of the act which is the consideration, he obtains for himself specific performance, without subjecting himself to a jurisdiction which courts of equity exercise in such cases to render the relief reciprocally just and equal. A judgment for the purchase money on a mere

true one. He argues that the title to the land does not pass by the tender of a deed to the defendant, and the plaintiff's continued readiness to deliver it, and that the true measure of damages is the excess of the contract price over the actual value of the land; and that inasmuch as there is no averment of such excess of the purchase price and no other damage claimed, the \$100 which the plaintiff admits to have been paid, more than balances the nominal damages arising on a breach of the contract by the defendant. The counsel is certainly sustained in his position as to the true measure of damages by the decision of the court in *Laird v. Pim*, 7 M. & W. 474. It also seems to me, that were it a new question in this state, there would be reason for adopting the principle which is now held to be law in the English courts. Because, what is sought to be recovered is damages for the violation of the defendant's contract, by which the plaintiff has suffered loss. But in the case of an agreement for land, the title does not pass by tender of

the deed: nor does it pass by operation of law on the recovery of a judgment for the purchase price, as is sometimes true of personal property. It is a case, therefore, where the plaintiff holds the title to the land, and recovers its full value expressed in the contract; and after judgment, when the defendant seeks to obtain the land, a court of law is without the power of affording him any relief. . . . The English rule would, therefore, seem to be more in accordance with general principles, and more in analogy to the action for not accepting personal property, as wheat, or other commodity which the defendant has purchased and contracted to receive and pay for. There is no necessity for the exercise of this jurisdiction, for the court of chancery is competent to order a specific performance of the agreement, and, at the same time, to see that a valid deed conveying the title is delivered, on the payment of the contract price." See *Bement v. Smith*, 15 Wend. 493; *Shannon v. Comstock*, 21 Wend. 457.

¹ *Clark v. Marseylia*, 1 Denio, 317.

tender of a conveyance, in a legal sense, is founded on the erroneous assumption that a tender of a deed is equivalent to a transfer of the property, and that the purchaser from the time it is made owes the agreed price. Such tender does not pass the title, though followed by recovery and collection of the stipulated consideration; and hence, in that case, the vendor would have both the purchase money and the legal seizin of the land sold. If he has not received a deed, and has not taken, or surrenders, the possession, he should not be subjected to the payment of the purchase price.¹

In a later English case,² the court say the plaintiff cannot have the land and the value too. A tender of performance will perfect a right of action; but it is not equivalent to performance for the recovery of damages.³ In some cases the courts have permitted the whole purchase money to be recovered where the deed after tender has been recorded,⁴ or has been brought into court to be delivered to the defendant.

In a case in Maine,⁵ the defendant gave his bond in a penalty of \$15,000, conditioned to pay for land according to the recited terms, which were to pay one-third part of the purchase money for 1,280 acres at \$6 per acre in thirty days, and two notes payable in one and two years, with good security, for the other two-thirds, the obligee being ready and willing to make the conveyance. An action of debt was brought on the bond without being preceded by even a tender of a deed. Emery, J., said: "This contract decidedly throws on the defendant the obligation of *first tendering the money* and the two notes with good security; for without this he could not expect to find the plaintiff ready and willing to make the deed of con-

¹ Scudder v. Waddingham, 7 Mo. App. 26.

² Laird v. Pim, 7 M. & W. 474.

³ Eastern Co. Ry. Co. v. Hawkes, 5 H. L. Cas. 331, 376; Wilson v. Martin, 1 Denio, 603; Spencer v. Halstead, id. 606; Shannon v. Comstock, 21 Wend. 457; Hecksher v. McCrea, 24 Wend. 304; Boardman v. Keeler, 21 Vt. 77; Clark v. Mayor, etc. 4 Comst. 338; Derby v. John-

son, 21 Vt. 17; Philadelphia R. R. Co. v. Howard, 13 How. U. S. 307; Pitkin v. Frink, 8 Met. 12; Donaldson v. Fuller, 3 S. & R. 505; Jewell v. Blandford, 7 Dana, 473; Davis v. Ayres, 9 Ala. 293; Rankin v. Darnell, 11 B. Mon. 30.

⁴ Sanborn v. Chamberlin, 101 Mass. 409.

⁵ Robinson v. Heard, 15 Me. 296.

veyance free from all incumbrances. But this does not impose on the defendant the duty of parting with his money without receiving the deed of conveyance, provided he takes the precaution of demanding it, and the jury ought not to have withdrawn from them the question whether the plaintiff was on his part ready to perform. . . . When a contract is made to sell and convey on one side, and on the other to purchase and pay for land, on a breach of the agreement, each party has an election to seek for damages in a suit at law, or proceed in equity for a specific performance. It is rather unusual for the same party to pursue both remedies. If the seller commence his suit at law, it is supposed that he is contented to keep the property, and pocket the damages which a jury may give him in satisfaction for the injury. Should he wish to get rid of the land, he will proceed in equity to compel specific performance, and in that case nothing would be recovered but the money and interest which were to be given. . . . The appeal to the jury in this case is to be relieved from the penalty of fifteen thousand dollars. If that sum had truly and intentionally been adopted and described in the contract as liquidated damages, and not as penalty on failure of performance, it may be doubted whether a court or a jury could rightfully have changed it. And had the deed been tendered in season and brought into court by the plaintiff and filed to be delivered to the defendant, perhaps the rule of damages prescribed by the judge (the purchase money) would be correct. It would hold the defendant to pay what he agreed. The plaintiff did not stipulate to receive any part of that sum in land. And the argument, then, that because he holds the land he ought not to recover the price stipulated to be paid by the defendant in money, ought not to avail, as it would tend to encourage people to break their contracts, in the hope of escaping with trifling damages, by casting the commodity back upon the seller's hands. But under those exceptions, no tender of the deed appears to have been made, nor does it appear to have been brought into court. Under such circumstances, to give the plaintiff a perfect indemnity, the rule, the court understands, to be the difference between the sum which the defendant agreed to give for the land, and the sum for which the plaintiff

could have sold it on the day when the contract should have been performed. Had the plaintiff put it up and sold it at auction, on that or the next day, after the refusal to take upon fair notice, and obtained a sum of money for it, it would be the duty of the defendant to make up the deficiency, and those two sums would have been the same as the plaintiff would have received if the defendant had performed. If the plaintiff has not done that, nor offered the title to the defendant, then he elects to keep the land at what price it might have sold for at that time."

It is evident, however, that these are irregular expedients to give the judgment at law the effect of specific performance. The importance given to a deposit of a deed in court implies that the sum recovered is not adjudged for damages for failure to perform the contract; but a decree is made for the specific moneys agreed to be paid, and decreed in view of such deposit, by which the plaintiff ostensibly keeps good a tender of equitable terms not expressly required or defined by the court.

The measure of damages which is more in accord with legal principles and analogies is that laid down in the English case which has been referred to;¹ and which has been followed in several late decisions in this country — the difference between the price fixed in the contract and the real value at the time the contract was to be executed. In a Massachusetts case,² the court, alluding to the argument for the rule that the purchase money should be the measure of damages, said: "We apprehend that that rule of damages, however applicable it may be to cases of contracts for the sale of personal property, where, by force and effect of mere delivery, or by judgment at law for the value of an article, the property may become vested in the party paying damages therefor, does not apply to real estate, which can only be transferred by deed. In actions against a vendee, on a contract for the purchase of real estate, we had supposed it to be a well settled rule, that when a party agrees to purchase real estate at a certain stipulated price, and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that it is the difference between the price fixed in

¹Laird v. Pim, *supra*.

²Old Colony Railroad Co. v. Evans, 6 Gray, 25.

the contract and the salable value of the land at the time the contract was to be executed." Finding some diversity of opinion on the subject, and even some Massachusetts cases not in accord with that rule, the court concludes with the remark that: "Upon more full consideration of the question of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages, in such a case, is the difference between the price agreed to be paid for the land, and the salable value of the land at the time the contract was broken."¹

In Pennsylvania, the purchase money may be and is habitually recovered, or its payment enforced, at law. There being no court of chancery in that state, specific performance, in name, is worked out in various legal actions. It may be done in covenant, debt, assumpsit, or ejectment.² When the purchase money is so recovered by the vendor, it is permitted as specific performance. That relief is so commonly granted at law, that it is held that under the act of 1836, giving jurisdiction in equity, for specific relief, where damages recoverable at law would be an inadequate remedy, a suit for specific performance at the instance of a vendor cannot be maintained, where he asks merely for the recovery of purchase money.³ The cases are numerous in that state; they illustrate the flexible character of the practice at law, and the facility with which legal actions are used to afford equitable redress.

The legal rule of damages there, based on the vendor's repudiation of the contract, if it cannot be specifically enforced, is the difference between the contract price and the real value at the time of the breach.⁴

¹Griswold v. Sabin, 51 N. H. 167; Porter v. Travis, 40 Ind. 556; Lewis v. Lee, 15 id. 499; Wilson v. Holden, 16 Abb. 133; Marcus v. Smith, 17 U. C. C. P. 416; Adams v. McMillan, 7 Port. 73. See D. W. V. & X. T. Co. v. Coy, 13 Ohio St. 84; Lafitte & Company, In re Lafitte Claims, 23 W. R. 379; Miller v. Collyer, 36 Barb. 250; Gray v. Case, 51 Mo. 463. Also see Webster v. Hoban, 7 Cranch, 399.

²Pennock v. Freeman, 1 Watts, 401; Stokeley v. Trout, 3 Watts, 163; Dixon v. Oliver, 5 Watts, 509; Findlay v. Keim, 62 Pa. St. 112.

³Kauffman's Appeal, 55 Pa. St. 383.

⁴Meason v. Kaine, 67 Pa. St. 126; Huber v. Burke, 11 S. & R. 238; Bowser v. Cessna, 62 Pa. St. 148; Ellett v. Paxton, 2 W. & S. 418. See Hutton v. Williams, 35 Ala. 503; Kelly v. Cunningham, 36 id. 78.

Where the purchase money is recoverable at law, it must of course be declared for, and its recovery is an enforcement of the contract.¹ Such a recovery in effect compels the vendee to take the property by obliging him to pay for it.² But it is only in clear cases, where the vendor is ready and willing to perform, and has offered to do so, that such a recovery can be had. If the vendor is in default, in point of time, or has not title, or it is incumbered, he cannot recover.³ There can be only technical objections to such recovery at law. The practical result is the same whether the contract is justly enforced in one court or another.

So long as the right of property in the thing agreed to be sold has not passed to the purchaser, the vendor is entitled, in case of the non-completion of the contract by the purchaser, to resell it; and if the resale has taken place within a reasonable period after the breach of the contract, the difference between the price realized on the resale and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be entitled to recover, in addition to the costs, charges and expenses of the resale.⁴

If the vendor does not resell the estate, but elects to keep it in his own hands, he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property, together with his costs, charges and ex-

¹ *Porter v. Travis*, 40 Ind. 556; *Bowser v. Cessna*, 62 Pa. St. 148.

² *Id.*

³ *Felton v. Weybright*, 8 Ohio, 168; *Kauffman's Appeal*, 55 Pa. St. 383; *Meason v. Kaine*, 67 Pa. St. 126; *Negley v. Lindsay*, 67 Pa. St. 217; *Huber v. Burke*, 11 S. & R. 238; *Smith v. McClosky*, 45 Barb. 610.

⁴ *Bowser v. Cessna*, 62 Pa. St. 148; *Webster v. Hoban*, 7 Cranch, 399. In this case, upon a sale of land at auction, the terms were that the purchaser should within thirty days give his notes, with two good indorsers, and, if he should fail to comply within thirty days, then the lands were to be resold on account

of the first purchaser. Held, that the vendor could not maintain an action against the vendee for a breach of the contract until such resale should take place, and have ascertained the deficit, although the vendee should instruct an attorney to draw a deed and insert his name as purchaser.

Livingston, J.: "It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing; or it might have been sold for less, and then, by paying the difference which would have formed his whole loss,

penses. Amongst these costs and charges may be included the expense of making out the title; for although the expense is, by custom and usage, defrayed by the vendor, yet that is done upon the understanding that the contract will be duly fulfilled by the purchaser.¹ If the conditions of sale provide for the payment of a deposit by the purchaser, and for the forfeiture of such deposit, in case of the failure of the purchaser to comply with the conditions, the deposit must, nevertheless, be brought into account by the vendor, if he seeks to recover the deficiency on a resale of the property.²

WHERE NOTES ARE GIVEN FOR THE PRICE.—Where, however, promissory notes are made for the purchase money, this rule, applicable where the contract is disaffirmed, can have no application. It would be no defense to an action on a promissory note that its consideration was an agreement to convey lands; that the consideration had failed wholly or in part, because, though the vendor had tendered the deed, the maker of the note had refused it and declined to consummate the purchase.³

he would not have been exposed, as he must be, if this action proceeds, to have damages assessed against him by some uncertain and arbitrary or unsatisfactory rule, which might be adopted by a jury. Of these advantages, which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him."

¹ 1 Addison on Cont. § 528.

² Okenden v. Henly, El. Bl. & El. 485.

³ In *White v. Beard*, 5 Porter, 94, A sold lands by parol agreement and put his vendee in possession. After the vendor's death, the vendee executed his note to the vendor's administrator, and took the administrator's bond for conveyance on payment of the purchase money. It was held that the administrator could recover, and the defense of a

failure of consideration could not be made, though the administrator was not able to convey the land. As the intestate made the verbal sale and put the purchaser in possession, the contract was part performed, so as to be capable of specific execution in equity, and, as the intestate had thus manifested an intention to convert the land into money, it belonged to the administrator, and the right of the heirs was subject to that disposition. *Lynch v. Baxter*, 4 Tex. 431; *Carter v. Carter*, 1 Bailey, 217; *Patton v. England*, 15 Ala. 69.

In *Lewis v. McMillen*, 41 Barb. 420, an action was brought on a promissory note given for \$1,000 by McMillen as principal, and two others as sureties. These are the facts: On the 21st of April, 1857, the plaintiff entered into a contract with McMillen to sell him a farm of about 96

Giving of notes for the purchase money so far executes the contract to buy, that the seller may sue on such notes for the purchase money without alleging the sale, and recover, unless

acres, at \$34.50 per acre. McMillen agreed to pay \$300 May 15, 1857, \$200 on the first of November, 1857, and \$1,000 May 1, 1858, upon which payment and his giving a bond and mortgage for the residue of the purchase money, the plaintiffs were to convey in fee by a good and sufficient deed. The payment of the money was declared by the contract to be a condition precedent to the execution of a deed. The note in question was given at the execution of the contract for the \$1,000 instalment. The defendant offered to prove, and the rejection of the evidence was the question on motion for a new trial to be decided, among other things, that the defendant paid the \$300 and the \$200, and tendered amount of the note and interest when due, and demanded conveyance, but the plaintiff, not having title except to four-fifths, could not and refused to convey; that the defendant required a rescission of the contract and repayment of what had been paid, and offered to relinquish possession, but the plaintiff refused to accede to the offer.

Johnson, J., delivered the opinion of the court, and said: "This action is not upon the contract, nor between the parties to it. The action is upon a separate and independent promise by the purchaser and other parties to pay the plaintiffs the sum specified at a particular day. The consideration of this promise, it is true, is the agreement of the plaintiffs with McMillen. But, before the defendants can defeat the action *entirely*, they must show either fraud in the transaction in which the note

has its inception, or an entire want, or failure, of consideration. A partial want, or failure, of consideration cannot be alleged in bar; and no fraud is shown. It is quite manifest that here is not an *entire* failure of consideration. The plaintiffs have not refused to convey the entire premises, and they insist upon their right to the whole, and this right to the largest portion by far is conceded. But, even if the plaintiffs had refused to convey, the contract, being still executory on their part, the cases are abundant to show that such refusal is no bar to an action upon a separate note, given to secure one or more of the payments. The party must pay the note, and take his remedy upon the contract to recover damages for the breach. In such case, the payment of the note, and the conveyance, are not concurrent, but independent acts. The note is in the nature of a condition precedent, and must be paid. This was expressly ruled in *Spiller v. Westlake*, 2 B. & Ad. 155; 22 Eng. C. L. 49. In that case, Lord Tenterden, C. J., says: 'I can see no reason why he should have executed a distinct instrument, whereby he promised to pay a part of the purchase money on a particular day, unless it was intended that he should pay the money on that day at all events.' Parke, J., was inclined to the opinion that the defense might have been maintainable, if the circumstances had been such that, had the defendant paid the money, he would have been entitled to recover it back in an action brought by him, which he held could not be done so long as the

the maker is able to show some defect of consideration by the fault of the vendor. The contract to convey, and the notes for the consideration, though separate instruments, are to be con-

tract remained open. Here the contract still remains open, neither party having rescinded or attempted to rescind. To the same effect are the cases of *Fraligh v. Platt*, 5 Cow. 494; *Moggridge v. Jones*, 14 East, 486; *S. C. 3 Camp. 38*, and *Chapman v. Eddy*, 13 Vt. 205. 1 Pars. on Bills, 203, note z. . . .

"The contract being, as we have seen, still open and unrescinded, and the defendant, *McMillen*, being in the full enjoyment of the benefit of the consideration of the note, is in no situation to resist payment. Parsons, in his book on Bills and Notes, at page 203, notices a distinction between the failure of the consideration of the note and the failure of a benefit resulting from it. As, where one party promises another to do a certain thing, and the other gives his note to the promisor, in consideration of such promise, the latter cannot defend against the note on the ground of a failure of the consideration, so long as he retains the promise made to him, or if it be of such a nature that the other party is permanently held upon it. Before he can defeat the note he must cancel the promise. And in *Wright v. Delafield*, 23 Barb. 498, it was held that a purchaser of land could not keep the land and refuse to pay for it, whether the title was good or bad. That if it was bad, he must elect to take it as it was, or as the vendor could make it, and pay for it, or else give it up. And that as the purchaser did not elect to give up the land, he must pay for it according to his agreement. This is only stating, in another form, a very familiar and elementary rule of law,

that where one obtains a right to the possession of land, and to the use and profits thereof, by virtue of an agreement, he cannot, while thus holding the land, dispute the title of him from whom he obtained it, and refuse to perform his agreement, under which he entered and continued to hold. Before he can do this, he must surrender the possession and place the party *in statu quo*. In other words, he must rescind *in toto*, by restoring what he received. . . .

"The action here is upon a separate promise, executed in part by persons who are not parties to the contract, and which contract is still open, neither party having put an end to it, on account of the default of the other, but each returning everything acquired under it. How can the court say that the plaintiffs shall not have the benefit of the contract, on their side, to recover according to its terms, the value of the property which the defendant *McMillen* obtained from them by means of it, and which he still keeps, and enjoys, and holds from them only. It was in consideration of his promise that he obtained the possession of these premises, and has so long enjoyed their use, and so long as he elects to keep the consideration and the benefits resulting from it, the law must hold him to his promise, and allow the other party to enforce it. Before the court can have any right to absolve him from his promise, he must do works meet for such absolution, which he has not yet done. It would be monstrous injustice, as it seems to me, in the court, to drive the plaintiffs to rescind the

strued together, and are parts of one contract.¹ And if they provide for payment on one side, and conveyance on the other, to take place at the same time, they are concurrent acts, and in their nature reciprocally dependent in the matter of performance. The vendor is not obliged to convey unless the purchase money is paid; nor can he be put in default, if he is able to fulfil, except by payment or tender of the purchase money.²

But if the vendor is unable to make title, or on demand and offer of the purchase money, refuses to convey, that fact will entitle the purchaser to rescind; and it will avail to support an action on the contract to sell, or as a defense to the vendor's action, either on the contract of purchase or on promissory notes for the purchase money.³

SELLER MUST CONVEY PERFECT TITLE.—Unless the contract specifies some exception, or can be construed to intend the contrary,⁴ it binds the vendor to convey a perfect, unincumbered title.⁵ If the purchaser has been let into possession, he cannot

contract, and seek some other remedy outside of it, in order to wrest the property from the tenacious grasp of the purchaser." See *Hal-sheizer v. Lamereaux*, 58 Ill. 72.

¹*Bailey v. Cromwell*, 4 Ill. 71; *Duncan v. Charles*, 5 id. 561; *Davis v. McVickers*, 11 id. 322; *Berryhill v. Byington*, 10 Iowa, 223; *School District v. Rogers*, 8 Iowa, 316.

²*Id.*

³*Lewis v. McMillen*, 31 Barb. 395. But see *S. C.* 41 Barb. 420; *Cooper v. Singleton*, 19 Tex. 260; *Baldrige v. Cook*, 27 id. 565; *Taylor v. Fulmore*, 1 Rich. 52; *Taylor v. Johnston*, 19 Tex. 351; *Lawrence v. Simonton*, 13 id. 220; *Clute v. Robison*, 2 John. 595; *Lewis v. Bibb*, 4 Port. 84; *Hunter v. Bradford*, 3 Fla. 269. Compare *Spiller v. Westlake*, 2 B. & Ad. 155; *Howard v. Witham*, 2 Greenlf. 390.

⁴See *Corbitt v. Berryhill*, 29 Iowa, 157.

⁵*Cullom v. Brauch Bank*, 4 Ala.

21; *Goddin v. Vaughn's Ex'r*, 14 Gratt. 102; *Souter v. Drake*, 5 B. & Ad. 992; *Doe v. Stanion*, 1 M. & W. 701; *Burwell v. Jackson*, 5 Seld. 535; *Shreck v. Price*, 3 Iowa, 360; *Crugh v. Shutte*, 9 W. & S. 82; In the Matter of *Humber*, 1 Edw. Ch. 1; *Hall v. Betty*, 4 M. & G. 410; *Pawis v. Roger*, 9 Price, 488; *Beyer v. Marks*, 2 Sweeny, 715; *Pomeroy v. Drury*, 14 Barb. 418; *Hunter v. O'Neil*, 12 Ala. 37; *Greenwood v. Ligen*, 10 S. & M. 615; *Traver v. Halstead*, 23 Wend. 66; *Dwight v. Cutler*, 3 Mich. 566; *Andrews v. Word*, 17 B. Mon. 518; *Fleming v. Harrison*, 2 Bibb, 171; *Vanada v. Hopkins*, 1 J. J. Marsh. 293; *Hedges v. Kerr*, 4 B. Mon. 526; *Davis v. Dycas*, 7 Bush, 4; *Hatcher v. Andrews*, 5 Bush, 561; *Guynot v. Mantel*, 4 Duer, 94; *Fannen v. Bellamy*, id. 663; *Grimes v. Ballard's Adm'r*, 8 B. Mon. 625; *Atkins v. Bahrett*, 19 Barb. 639; *Witter v. Biscoe*, 13 Ark. 422.

rescind for the default of the vendor, unless he surrenders such possession;¹ but where the obligation is concurrent to convey a good title at the time of receiving payment, the purchaser is not precluded by his possession from setting up a defect of the vendor's title, or his refusal to convey, as a defense to an action on purchase money notes, or a contract of purchase.²

RECOUPMENT FOR DEFECT OF TITLE.—Where the obligation to pay is precedent to that of the other party to convey, but the time fixed for conveyance has arrived, the inability of the vendor to make title is available as a defense to an action on notes for the purchase money, on the principle of recoupment. If the defense goes to the whole purchase money, it may accomplish a nullification of the sale, and in the absence of any possession by the vendor, there is no obstacle to the defense generally at law.³ But if the defendant has taken possession, and retains it at the time of the action, he affirms the contract, and can set up no counter-claim, unless he has been damnified; though he may, of course, insist on a precedent condition; he cannot insist on a defect of the plaintiff's title, unless he has been disturbed in his possession by it, or has extinguished it; nor any incumbrance, unless he has paid it.⁴

¹ Reed v. Davis, 4 Ala. 83; Jackson v. McGinnis, 14 Pa. St. 331; Gans v. Renshaw, 2 Pa. St. 34. See Giles v. Williams, 3 Ala. 316.

² Lewis v. White, 16 Ohio St. 444; Lewis v. McMillen, 31 Barb. 395; Baldrige v. Cook, 27 Tex. 565; Davis v. McVicker, 11 Ill. 327. But see Lewis v. McMillen, 41 Barb. 420. And in McIndoe v. Morman, 26 Wis. 588, a bond was given by the vendor for a deed, to be made at a specified time, provided the obligee should pay \$400 on or before that date. An action was brought by the vendor to foreclose the contract, the complaint containing the allegation that the plaintiff had tendered a deed. The answer set up, and on the trial it was proved, that the plaintiff's title was defective. It

was held that the vendee, being in possession, could not resist the payment of purchase money on that ground.

³ Fisher v. Salmon, 1 Cal. 413; Tillotson v. Grapes, 4 N. H. 444; Dickinson v. Hall, 14 Pick. 217; Trask v. Vinson, 20 Pick. 110; Moore v. Ellsworth, 3 Conn. 483. See vol. 1, p. 289.

⁴ Gaar v. Lockbridge, 9 Ind. 92; Buell v. Tate, 7 Blackf. 55; Wiley v. Howard, 15 Ind. 169; Barber v. Kilborn, 16 Wis. 486; Bordeaux's Ex'r v. Case, 1 Bailey, 250; Adm'r of Carter v. Carter, id. 217; Stone v. Gover, 1 Ala. 287; Bates v. Terrill, 7 Ala. 129; Lampkin v. Ruse, 7 Ala. 170; Worthington v. McRoberts, id. 814; S. C. 9 Ala. 297; Wilson v. Jordan, 3 Stew. & P. 92; Lee v. White,

PURCHASER IN POSSESSION CANNOT OBJECT THAT THE CONTRACT IS INVALID.—While in possession under a parol contract of sale, the vendee cannot defend against notes for the purchase money, on the ground that the contract is void under the statute of frauds. The contract is not unlawful, and while the vendee is in possession, and the vendor neither repudiates the contract, nor is in default, there is no defect of consideration.¹

WHEN THE CONTRACT DOES NOT FIX THE PRICE.—The amount a vendor is entitled to recover for land contracted or conveyed may not be fixed by the contract; then, it must be ascertained by proof or by such other means as the contract points out. The time of the valuation may be material where the value fluctuates. Doubtless the value should be ascertained as of the date of the sale, when the vendor agrees to part with the land, and the purchaser to take it, unless they indicate a different time. Where there was a covenant to pay for a surplus, if any, in a tract of land, without designating a time, it was held to refer to the time for paying for the rest, and that the value at that time was the criterion of damages, because the agreement provided that the vendor might have more than the price agreed for the rest, if “at the time of payment” he was dissatisfied with that price, and disinterested men should value the land higher.² On the question of value the admission of the pur-

4 Stew. & P. 178; *George v. Stockton*, 1 Ala. 136; *Christian v. Scott*, 1 Stew. 490; *Peden v. Moore*, 1 Stew. & P. 71; *Lynch v. Baxter*, 4 Tex. 431; *Wood v. Perry*, 1 Barb. 114; *Galloway v. Findley*, 12 Pet. 264; *Curran v. Rogers*, 35 Mich. 221. See *Tompkins v. Hyatt*, 28 N. Y. 347.

¹*Gillespie v. Battle*, 15 Ala. 276; *Cope v. Williams*, 4 Ala. 362; *Johnson v. Hanson*, 6 id. 351; *Rhodes v. Storr*, 7 id. 346. Compare *Bates v. Terrell*, 7 Ala. 129.

²*Kea's Representatives v. McMillan*, 2 J. J. Marsh. 12; *Means v. Miliken*, 33 Pa. St. 517. In this case, a debtor conveyed land to his creditor in satisfaction of his indebtedness,

under a verbal agreement that the debtor should have all the profit on a resale within five years, over above the amount of his debt with interest, etc.; before the expiration of the five years the grantor gave notice to the other party to sell, but the grantor had previously disposed of the property. *Held*, in an action to recover the difference between the amount of the debt and interest and what the property might have been sold for, that the damages were to be estimated by what it would have produced at the time notice was given to sell, and not by the highest price that could have been procured at any time during the five years.

chaser may be considered. In one case,¹ a party conveyed land on the parol promise of the grantee to convey to him certain other lands, which such grantee refused afterwards to do; and it was held that the grantor was entitled to recover the value of his conveyance upon an implied promise; and that the plaintiff might prove, on the question of value, the worth of the land that the defendant agreed to convey, not as a basis of recovery, but as a declaration on the subject of value.² Where a party refuses to convey land contracted in exchange, he is liable on the contract for the value at the time of the breach.³ A purchase by the acre of a tract lying on both sides of a river, does not bind the purchaser to pay for the land in the river though it passes by the deed.⁴

INTEREST ON PURCHASE MONEY.—If the vendee is in possession under his purchase, he will generally be charged with interest on the purchase money after it has become due, even where the completion of the sale is delayed, in pursuance of the contract, on account of the title, or by the acquiescence of the vendee;⁵ unless he keeps the money in hand idle, to be paid when the vendor becomes entitled to it.⁶ A purchaser of land who contracted to pay the purchase money at a future named day, or as soon thereafter as incumbrances are removed, is not bound, without an express stipulation, to see to the removal; but if he take possession, and remain in the uninterrupted enjoyment of the land, he is liable for interest, after the day appointed for payment, although the incumbrances have not been removed; unless it appear that he had laid by the money which remained unemployed and unprofitable, in order to meet the payment when the incumbrance should be removed.⁷

¹ Bassett v. Bassett, 55 Me. 127.

² See King v. Brown, 2 Hill, 485; Kneeland v. Fuller, 51 Me. 518. See also Basford v. Pearson, 9 Allen, 387.

³ Burr v. Todd, 41 Pa. St. 206.

⁴ Daniels v. Cheshire R. R. Co. 20 N. H. 85.

⁵ Brockenbrough v. Blythe's Ex'r, 3 Leigh, 619; 2 Addison on Cont. § 527.

⁶ Id.; Hampton v. Egleberger, 2 Bailey, 520.

⁷ Id. The court, in this case, say: "The case of Rutledge v. Smith, 1 McCord Ch. 403, will serve as an illustration of the principle, whilst its application points out an exception founded on the principle itself. There the defendant purchased a house and lot at auction for cash, and placed the money in the hands

of an agent to pay the whole amount; but the agent, finding that there were, as in this case, legal incumbrances upon it, retained a part of the same, until they should be removed; and that not having been done a considerable time after, he returned this balance to the defendant, who had taken possession of the house immediately after the purchase. And it was held that she was liable for interest on this balance from the time she received it from the agent, but not whilst it remained in his hands; because she was ignorant that it so remained there, and could have derived no profit from it. And if it had been shown in this case that Egleberger laid by the amount due to the plaintiff to meet the demand when the incumbrances should have been removed, he would doubtless have been exempted from the payment of interest. But that is not pretended.

“It was insisted by counsel for the motion that until the plaintiff had discharged the incumbrances, which he considered as a condition precedent, she was not entitled to receive the principal, and hence it was concluded that she was not entitled to interest on what the defendant had a right to retain. This argument has been already sufficiently answered. His liability arises

out of the profit which he derived from the use and occupation of the lands, and the consequent loss to the plaintiff.”

The grantees of certain lands had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be kept enclosed on all the sides abutting on the land of the grantor, with a brick wall seven feet high. The grantees not having erected the wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for breach of the covenant. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiff was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall; held, that the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of the contract and what it would have been if the contract had been performed, under the circumstances of the case, the amount that it would cost to build the wall was not the correct measure of damages. *Wigsell v. School, etc.* 8 Q. B. Div. 357.

SECTION 2.

PURCHASER AGAINST VENDOR.

Measure of damages in England—Conflict of American decisions on the measure of damages—Elements of damages under the milder rule—Recovery in cases of parol contract—Elements of damage where Flureau v. Thornhill does not apply—Rights of defaulting vendee—Conflict of the cases in this country—Adjustment of counter-demands on rescission—Damages in suits for specific performance.

MEASURE OF DAMAGES IN ENGLAND.—The rule of damages against a vendor who fails to perform his contract to convey has been subject to some diversity of decision. While the general rule of damages is recognized that the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled, this rule is relaxed, and an exception admitted in some jurisdictions in favor of a vendor who makes a contract to sell and convey in good faith; who believes himself to be the owner of the property, and is afterwards incapable of performing, by reason of a defect in his title of which he was not aware. The damages in such a case are only nominal. The vendee can only recover back any payments made, with interest, and the expenses incurred in the investigation of the title. This exception was first admitted in *Flureau v. Thornhill*,¹ in which it was said by Chief Justice De Gray, "if the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These [contracts of sale] are merely upon condition; frequently expressed, but always implied, that the vendor has a good title; if he has not, the return of the deposit, with interest and costs, is all that can be expected." This case has been followed in many other cases in England, and by many in this country. These subsequent cases define more precisely, but not always consistently, the scope of the exception. The mild and excep-

¹ 2 W. Bl. 1078.

tional rule, as supported by the weight of authority, it is believed, is that above stated; and is confined to cases of inability to perform arising from a discovery, after the contract, of a previously unsuspected defect in the vendor's title.

In England the cases indicate that the doctrine and measure of damages in *Flureau v. Thornhill* is accepted as the rule, and any departure by allowing the recovery of damages by any more liberal standard for the vendee, as exceptional, if, indeed, they do not tend to the conclusion that it is the exclusive rule; and a vendee put to his action for deceit, if he seeks for enhanced damages on the ground of fraud. It cannot be said that the courts there have reached that point, but the following observations of Lord Chelmsford, in *Bain v. Fothergill*,¹ show the tendency in that direction. He said: "I fully agree in the doubt expressed by Mr. Justice Blackburn, in *Sikes v. Wild*,² as to the soundness of the exception in *Hopkins v. Grazebrook*,³ and in the observations which follow the expression of that doubt. The learned judge said: 'I do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit; but surely it cannot alter the effect of the contract itself.' . . . Upon review of all the decisions on the subject, I think that the case of *Hopkins v. Grazebrook*⁴ ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the court of exchequer in the present case is right, whether it falls within the rule established by *Flureau v. Thornhill*, or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has

¹ L. R. 7 Eng. & Ir. App. 158.

² 6 B. & C. 31.

³ 1 B. & S. 537.

⁴ *Id.*

incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."

This case of *Bain v. Fothergill* was decided in the house of lords in 1874, and the opinions contain a thorough analysis and comparison of all the English cases on the point under consideration. F was in possession of a mining royalty under a written agreement for a lease of which he had taken an assignment. One of the stipulations of the agreement was that H (the person with whom the agreement was originally made) should not assign without the consent of the lessors. They were ready to consent to the assignment to F, provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject, he delayed doing so. F entered into a contract with B to sell his interest in the royalty, but it was afterwards found that the lessors absolutely refused their assent to the transfer, and F was unable to perform his contract with B; and B brought an action against F for its non-performance, and it was held that he could recover only the expenses he had incurred.¹ The general rule there be-

¹ Mr. Justice Denman dissented, and thus states the facts on which his dissent was placed: "It appears that when the contract of the 17th of October, 1867, was signed, the defendant, Fothergill, knew that the consent of Hill's lessors was required before Hill's executors could assign their interest to the defendants, and also that the like consent was necessary before the defendants could effectually assign their interests to the plaintiffs. The plaintiffs were not informed, either of the necessity or of the non-existence of such consent. It further appears that before the contract was signed the defendants had had notice, through their solicitor, that the consent of the lessors of Hill to the assignment of his agreement with them was dependent upon the defendants doing an act which they were being pressed to do as far back

as October, 1865, and which had not yet been done, and that such notice was not communicated to the plaintiff, nor the difficulty which might obviously arise in consequence pointed out. It appears to me that, under the circumstances, it was so clearly the duty of Mr. Fothergill to have put the plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the royalty, that it is impossible for the defendants to rely upon the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078. I think that the contract in this case did not go off through the *discovery* by the defendants that they could not make a good title, but by reason of the oversanguine expectation on the part of Mr. Fothergill, that an obstacle which he *knew* to exist, and over which he had no control, would somehow or other cease to exist be-

ing to give no more than nominal damages and the expenses of investigating the title, except in a clear case of bad faith on the part of the vendor, there is the anomaly of aggravating the damages in an action upon contract on the ground of fraud. The anomaly, however, goes no farther than to secure to the vendee full compensation for the injury he sustains, according to the standard on other contracts of sale, namely, value of the bargain. The cases are not numerous in England, in which the increased damages have been allowed. The first was decided in 1826, and those which followed were based upon it. The original case has now been overruled; and as a consequence the authority of the subsequent cases is shaken.¹

fore the completion of the purchase. In such a case, I am of opinion that the case of *Flureau v. Thornhill* does not apply.

¹The case of *Hopkins v. Grazebrook*, 6 B. & C. 31, is the case which introduced the exception to the rule of damages laid down in *Flureau v. Thornhill*, and in *Bain v. Fothergill*. Lord Chelmsford thus criticises it, and the cases which followed. He says: "The decision itself in *Hopkins v. Grazebrook* cannot be supported. The seller in that case had undoubtedly an equitable estate in respect to which he had a right to contract. Therefore the language of Chief Justice Abbott, that 'the defendant had entered into a contract to sell without the power to confer even the shadow of a title,' is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in *Hopkins v. Grazebrook* did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in *Flureau v. Thornhill*, and as having withdrawn

from its operation a class of cases where a person knowing that he has no title to real estate, enters into a contract for the sale of it. It is not correct to say, with Lord St. Leonard in his *Vendors and Purchasers* (14th ed. p. 359), that *Hopkins v. Grazebrook* has not been followed. It has been recognized in several cases since, and in one to which I shall presently refer, it has been expressly followed.

"In *Robinson v. Harman*, 1 Exch. 850, already mentioned as having sanctioned the decision in *Flureau v. Thornhill*, Baron Parke said: 'The present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins v. Grazebrook*.' And Baron Alderson and Baron Platt express the same opinion. In *Pounsett v. Fuller*, 17 C. B. 660, *Hopkins v. Grazebrook* was treated as a valid authority by all the judges, the question which they considered being whether the case fell within *Flureau v. Thornhill*, or the exception in *Hopkins v. Grazebrook*, and they decided that it was within the former case.

"But in the case of *Engel v. Fitch*, the Court of Queen's Bench,

CONFLICT OF AMERICAN DECISIONS ON MEASURE OF DAMAGES.—
The doctrine of the American courts has been less liberal to the

L. R. 3 Q. B. 314, and afterwards in the Exchequer Chamber, L. R. 4 Q. B. 659, 664, proceeded expressly on the cases of *Hopkins v. Grazebrook* and *Robinson v. Harmer*, the chief baron quoting the very words of the lord chief justice, and relying on those cases. In that case, the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on the completion of the purchase. The purchaser sold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of the expense. The purchaser brought an action upon the contract of sale, and it was held that, as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover, not only the deposit and expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shown he would have made upon a resale. It was after this decision in *Engel v. Fitch*, that the plaintiff in error declined to argue the present case in the exchequer chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal. Notwithstanding the repeated recognition of the authority of *Hopkins v. Grazebrook*, I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the

exception which it introduced to the rule established by *Flureau v. Thornhill*, with respect to damages upon the breach of a contract for the sale of a real estate: for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the court in *Hopkins v. Grazebrook* engrafted upon the rule in *Flureau v. Thornhill* has always been taken to be this: that in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain."

Mr. Baron Pollock said: "In *Robinson v. Harman*, 1 Ex. 850, the defendant agreed to grant a valid lease when he well knew that he had no power to do so. In *Engel v. Fitch*, in which there was given an elaborate and exhaustive judgment of the court of queen's bench, confirmed by the exchequer chamber, the defendants, who were mortgagees of a lease but not in possession, sold it to the plaintiff, undertaking by the particulars of sale, that possession should be given on completion of the purchase, and on the faith of this the plaintiff resold at a profit. The title was good, but on the plaintiff requiring possession, it was found that the mortgagor was in possession and refused to give it up; and farther, that the defendants could have ousted him by ejectment, but refused to incur the necessary expenses. Under these circumstances, the judges in the queen's bench held that the plaintiff was entitled to recover, not merely

vendor. The general rule is the same that applies generally — adequate compensation for the actual injury, or, as it is briefly

the deposit and expense of investigating the title, but also the damages for the loss of his bargain; and in giving the grounds for their judgment on the particular case, said that ‘the rule in *Flureau v. Thornhill* can have no application where the failure either to make out a title or to give possession arises not from inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense.’ It was urged by the learned counsel for the plaintiffs in error, that the rule laid down in *Flureau v. Thornhill* was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from that applicable to a contract for the sale of goods is true, but the subject matter to which it is applied differs also.

“It is observable, in following the history of the rule in question, that when it was first laid down in *Flureau v. Thornhill*, the whole question of the proper measure of damages had not received from our courts the attention which it has done in later years. Moreover, at that time, although it had never been expressly decided, it was commonly supposed that, upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor*, as laid down in *Co. Litt. p. 103a*, and by *Noy*, in his *Maxim*, c. 42, applied; but assuming that the difference exists, as it now undoubtedly does, there are two

marked distinctions affecting the present question between a contract for the sale of personal and of real property.

“In the first place, a man who sells goods must be taken to know whether they are his or not. Secondly, he must be aware that, in the majority of cases, the goods he is selling are intended for resale, or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of its deficiency may fairly be presumed to be in the minds of the contracting parties. With real estate the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not; hence, as was said by the court, in *Engel v. Fitch* (L. R. 3 Q. B. 314; id. 4 Q. B. 659), the undoubted owner of an estate often finds, unexpectedly, a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bona fide*, the difficulty must be equally known to the vendee as to the vendor.” [In the particular case, the vendor knew the difficulty, and did not communicate it to the vendee; his good faith could therefore only have been inferred from the fact that he forgot to mention it, or omitted to do so by under-estimating its importance.]

“Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined, is unusual.” [When a vendor contracts to sell in this unusual way, however, he is exempt from damages, if it happens

expressed, damages for the loss of the bargain. In some jurisdictions, there is no deviation from this rule on account of good

unexpectedly that his vendor will not confer the power to fulfil. See *Hopkins v. Grazebrook*, which was held to be incorrectly decided. *Sikes v. Wild*, 1 B. & S. 587; 4 id. 421; *Walker v. Moore*, 10 B. & C. 416.] "It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty that the vendor has power to convey, but as involving the condition that the vendor has a good title; and that if, on examination of the abstract, this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual covenants had been executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* was rightly decided, at the time it was decided, on sufficient legal principles; but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale, made on the footing of that decision, was correct."

Lord Heatherly, also favoring the judgment which was pronounced, said: "The reasons given for the judgment in *Flureau v. Thornhill* were certainly not altogether satisfactory, because the lord chief justice is said, upon that occasion, to have stated *simpliciter*, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bar-

gain; to which Mr. Justice Blackstone added, that 'these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.' That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded; if the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract" [and, it may be added, compensation for any defect of title. *Mestaer v. Gillespie*, 11 Ves. 621-640; *Mortlock v. Butler*, 10 Ves. 292; *Wood v. Griffith*, 1 Swanst. 54; *Milligan v. Coke*, 16 Ves. 1; *Seaman v. Vawdrey*, 16 Ves. 390; *Painter v. Newby*, 11 Hare, 26; *Woodbury v. Luddy*, 14 Allen, 1]. "Therefore the reason is, not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be

faith, and inability to perform, resulting from an unsuspected defect in the vendor's title; and there the symmetry of the law relating to sales is preserved.¹ Titles to real estate in this country are as a general thing less complicated, more readily investigated, and, by our jurisprudence, depend on rules which are less refined and abstruse. The reasoning upon which the damages have been made merely nominal against a defaulting vendor who has acted in good faith, and has been prevented from performing by unforeseen causes, has not been entirely satisfactory even to judges who have applied that rule in consequence of the supposed weight of general or local authority. The difficulty of ascertaining the state of the title, either in England or in this country, may well make both of the parties cautious, but it is a difficulty which they must surmount; and whether the loss is made to fall on one of the parties or the other, the state of the title is involved in every sale, and at some stage of the negotiation, or of the steps taken with a view to performance, is examined and ascertained. The vendor has the means of ascertaining his title, and where he undertakes absolutely to convey a particular estate, it is more consistent with the responsibility which the law attaches to all other undertakings to impose the obligation which it imports, and the

held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating the matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper so to do; but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated,

and before it is ascertained whether or not the title of his vendor is a good one."

¹ Wells v. Abernethy, 5 Conn. 222; Hopkins v. Lee, 6 Wheat. 109; McKee v. Brandon, 3 Ill. 333; Buckmaster v. Grundy, 2 Ill. 310; Gale v. Dean, 20 Ill. 320; Cannell v. McClean, 6 Har. & J. 297; Bryant v. Hambrick, 9 Ga. 133; Whiteside v. Jennings, 19 Ala. 784; Hill v. Hobart, 16 Me. 164; Warren v. Wheeler, 21 Me. 484; Doherty v. Dolan, 65 Me. 87; Hopkins v. Yowell, 5 Yerg. 305; Shaw v. Wilkins, 8 Humph. 647; Barbour v. Nichols, 3 R. I. 187; Nichols v. Freeman, 11 Ired. L. 99; Lee v. Russell, 8 id. 526; Spruell v. Davenport, 5 id. 145. See Fuller v. Reed, 38 Cal. 99.

liability to make full compensation on default. The reasons which govern the measure of damages on breach of the covenants for title in deeds have but slight application, considering the brief period during which these contracts operate.

In an action upon such a contract in Maine, the law of damages was thus pointedly discussed by Peters, J.:¹ "The general rule of damages in this form of action is well settled. If the plaintiff had paid nothing down, and the land was worth at the date of the breach more than he was to give for it, the difference would be his profit, and he could recover that amount. If there was no difference between the contract price and the value of the land, when it should have been conveyed, and nothing was paid, then his damages could be nominal only; or if, in such case, the land was worth less than the contract price, he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full, he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment, and the land worth less than the contract price at the time a conveyance should have been made, that the damages would be what the land was then worth, less the amount of the price for it that remained unpaid. By paying the full price, the vendor is entitled to the land or its value, whatever the value may be. The recovery of damages, according to these rules, puts him in as good condition as if the contract had been performed. He gets exact indemnity."²

Referring to the English rule, he says: "Many of the American state courts have adopted it. It prevails in New York, although much doubt of its correctness has been expressed by the individual members of the courts of that state. . . . The supreme court of the United States does not sustain the doctrine. . . . We do not discover that the precise point, namely, whether the measure of damages depends at all upon the cause of the failure to convey, has ever been noticed in any reported case in our own state. Still, it can hardly be regarded

¹ Doherty v. Dolan, 65 Me. 87.

v. Heard, 15 Me. 296; Russell v.

² Warren v. Wheeler, 21 Me. 484;

Copeland, 30 Me. 332; Lawrence v.

Hill v. Hobart, 16 Me. 164; Robinson

Chase, 54 Me. 196.

here as a new question. We think it is virtually settled by decisions in analogous cases. In the case of personal property, the measure of damages has uniformly been based, in this state, upon the value of the articles when they should have been delivered, and not upon the consideration paid therefor.¹

The reason assigned in the New York cases (and in cases elsewhere) for the adoption of the rule there adopted, is the analogy that is claimed to exist between actions for the breach of a covenant to convey land, and actions for the breach of a covenant for the quiet enjoyment of land and for warranty of title.² But that can be no argument for the doctrine here, but conclusive argument against it, inasmuch as, while the rule of damages in those courts, under the covenants of quiet enjoyment and warranty of title, is the consideration paid for the land and interest, the measure in this state is the value of the land at the time of the eviction.³ Still, it is not to be admitted that a complete similitude exists between the two classes of covenants on their legal bearing and effect. There is less harshness in applying our rule to contracts to convey, than to the case of covenants in deeds. Improvements are not so likely to be made upon the land in the former as in the latter case, by the person in possession. The correctness of the comparison is questioned in the opinion of the majority of the court in *Pumpelly v. Phelps*.⁴ We think that the rule that we are disposed to adhere to as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceits about it. The vendor is strongly tempted to avoid his agreement, where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The vendor

¹ *Smith v. Berry*, 18 Me. 122; *Furlong v. Polleys*, 30 Me. 491; *Berry v. Dwinel*, 44 Me. 255; *Bush v. Holmes*, 53 Me. 417.

² *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKean*, 4 Denio, 546.

³ *Hardy v. Nelson*, 27 Me. 525; *Elder v. True*, 32 Me. 104, and cases there cited.

⁴ 40 N. Y. 59.

knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency, as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief afforded by our rule is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussion and refinements, in relation to the modifications and restrictions and qualifications which, in different jurisdictions, have been annexed to it."

But the principle on which damages were exceptionally reduced in *Flureau v. Thornhill* has been adopted as settled law in many, and probably a majority, of the states. Where this is the case, the liability is not, perhaps, as much restricted as in England.¹

If the person selling is in fault;— if he knew or should have known that he could not comply with his undertaking; if he, being an agent, contracted in his own name, depending on his principal to fulfil his contract merely because he had power to negotiate a sale; if he has merely a contract of the owner to convey, or a bond for a deed; if his contract to sell requires the signature of a wife to bar an inchoate right of dower, or the consent of a third person to render his deed effectual; if he makes his contract without title in the expectation of subsequently being able to acquire it, and is unable to fulfil by reason of causes so known; the want of concurrence of other persons; or if he has title and refuses to convey, or disables himself from doing so by conveyance to another person; in all such cases, he is beyond the reach of the principle of *Flureau v. Thornhill*,

¹ *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKean*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140; *Allen v. Anderson*, 2 Bibb, 415; *Goff v. Hawks*, 5 J. J. Marsh. 341; *Combs v. Tarlton's Adm'r*, 2 Dana, 464; *Seamore v. Harlan's Heirs*, 3 Dana, 410; *Herndon v. Venable*, 7 Dana, 571; *Hall v. Delaplaine*, 5 Wis. 206; *Foley v. McKeegan*, 4 Iowa, 1; *Swcem v. Steele*, 5 Iowa, 352; *Thompson v. Guthrie*, 9 Leigh, 101; *Dannica v. Sharp*, 7 Mo. 71; *Bitner v. Brough*, 11 Pa. St. 127; *McClowry v. Chrogan's Adm'r*, 31 Pa. St. 22; *McDowell v. Oyer*, 21 Pa. St. 417; *Hertzog v. Hertzog*, 34 Pa. St. 418; *McNair v. Compton*, 35 Pa. St. 23; *Saulters v. Victory*, 35 Vt. 351; *Hammond v. Hannin*, 21 Mich. 374; *Hall v. York*, 22 Tex. 641; *Margraf v. Muir*, 57 N. Y. 155; *Drake v. Baker*, 34 N. J. L. 358; *Wheeler v. Styles*, 28 Tex. 240.

and is liable to full compensatory damages, including those for the loss of the bargain.¹

In a case in New York,² Mason, J., thus discusses this rule of damages: "There has never seemed to me to have been any very good foundation for the rule which excuses a party from the performance of his contract, to sell and convey lands, because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule is placed. In England, the rule seems to have been sustained upon the ground of an implied understanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. In the leading case upon this subject,³ Blackstone, J., said: 'These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title,' while in this country the rule is based upon the analogy between this class of cases and actions for the breach of covenant of warranty of title.⁴ The rule of damages in an action for a breach of covenant of warranty of title is settled to be the consideration paid, and the interest; and yet this is an arbitrary rule, and works great injustice many times, and the courts met with great embarrassment in settling it. These difficulties were considered and well expressed in the lead-

¹ Allen v. Atkinson, 21 Mich. 351; Dustin v. Newcomer, 8 Ohio, 49; Trull v. Granger, 8 N. Y. 115; Engel v. Fitch, L. R. 3 Q. B. 314; S. C. L. R. 4 Q. B. 659; Martin v. Wright, 21 Ga. 504; Cox v. Henry, 32 Pa. St. 18; Burr v. Todd, 41 Pa. St. 296; Gressom v. Sorrell, 8 Humph. 372; Foley v. McKeegan, 4 Iowa, 1; Sweem v. Steele, 5 id. 352; Pumpelly v. Phelps, 40 N. Y. 59; Brinckerhoff v. Phelps, 24 Barb. 100; Hopkins v. Lee, 6 Wheat. 109; Drake v. Baker, 34 N. J. L. 358; Driggs v. Dwight, 17 Wend. 71; McNair v. Compton, 35 Pa. St. 23; Wilson v. Spencer, 11 Leigh, 261; Graham v. Hackwith, 1 A. K. Marsh. 423; Bush v. Cole, 28 N. Y. 261; Burwell v. Jackson, 9 N.

Y. 535; Dean v. Roesler, 1 Hilt. 420; Lewis v. Lee, 15 Ind. 499; White v. Madison, 26 N. Y. 124; Stephenson v. Harrison, 3 Litt. 170; Kirkpatrick v. Downing, 58 Mo. 32; Pringle v. Spalding, 53 Barb. 17; Gibbs v. Champion, 3 Ohio, 335; Scott v. Reikel, 15 U. C. C. P. 200; Plummer v. Simonton, 16 U. C. Q. B. 220; Vallier v. Walsh, 6 U. C. C. P. 459; McConnell v. Dunlop, Hardin, 41; Gerault v. Anderson, 2 Bibb, 543; Davis v. Lewis, 4 Bibb, 456; Morgan v. Stearns, 40 Cal. 434.

² Pumpelly v. Phelps, 40 N. Y. 59.

³ Flureau v. Thornhill, 2 W. Bl. 1078.

⁴ Baldwin v. Munn, 2 Wend. 399; Peters v. McKean, 4 Denio, 516.

ing case in this state,¹ in which the court said: 'To find a rule of damages in a case like this is a work of difficulty. None will be entirely free from objection, or will not, at times, work injustice. To refund the consideration, even with the interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the money might have been laid out to equal advantage elsewhere. Yet, to make this increased value, the criterion, where there has been no fraud, may be attended with injustice, if not ruin. A piece of land is bought, solely for the purpose of agriculture, and, by some unforeseen turn of fortune, it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which the value of the property might rise, by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? There is still another class of cases where the rule of simply refunding the purchase money and the interest operates with great hardship and injustice upon the purchaser. A purchases of B a city lot for the purpose of building himself a dwelling or buildings upon it, and takes from B a full covenant deed of the premises, covenanting to assure, or warrant and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B is evicted by a paramount title, ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or reasonable return in damages, for the law to give one, who holds a covenant, to make good and to defend the title. The reasons assigned for this rule, in actions for breach of covenant of warranty of title, can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case, the vendee knows he has not got the title, and that perhaps he may never get it; and, if he will go on and make expenditures under such circumstances, it is his own fault; and, besides, these preliminary contracts to convey

¹ *Statts v. Ex'rs of Ten Eyck*, 3 Cai. 111.

generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase of value of the property, as there is in these covenants in deeds, which run with the land, through all time, . . . These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated. I have referred to this matter simply as furnishing an argument against, in any degree, extending the rule, and as a reason for limiting it strictly, where the already adjudged cases, in our own courts, have placed it." In this case, the party contracting as vendor was a trustee having power to sell with the consent of a third person. He made the contract in his own name, and absolute in terms. Not being able to obtain the necessary consent, he was unable to perform, and was held liable to the difference between the value of the land and the price to be paid for it.

A similar case arose in New Jersey.¹ The vendor was not able to perform because the consent and concurrence of his wife was necessary. Beasley, Ch. J., said: "The defendant in this suit knew when he agreed to make a perfect title to this property, that it was altogether uncertain whether he would be able to do so, for his ability to discharge his contract was dependent upon the consent of his wife. With a full knowledge of his power of performance being contingent, he entered into this absolute stipulation, and I think this circumstance should take this case out of the rule adopted in *Flureau v. Thornhill*. It may be quite reasonable that an implicit understanding should grow up between vendors and vendees of real estate, that a vendor should not be responsible for secret flaws in the title of the property, and that such understanding should assume the form of a rule of law. But there seems no rational ground for the hypothesis that a similar relaxation of the general law exists in those cases in which a man agrees, in an absolute form, to do some act, which he knows he has not the power to do without the assent of a third party. In the former class of

¹ *Drake v. Baker*, 34 N. J. L. 353.

cases, there is a semblance of good sense and public convenience in favor of the application of the rule, excluding the liability in question, but in the latter class there is apparently none whatever."

The exemption of the vendor from the severer rule of damages does not extend beyond his inability to perform his contract, by reason of a defect in his title which was unknown to him at the time he entered into the contract to sell. This rule will exclude all defaults that are wilful, or which arise from contingencies known to the vendor, and of which he consciously assumed the risk.¹ In cases of this latter kind, the contract is either made or violated in bad faith, or it is of a speculative character.²

An agreement for exchange of lands performed on one side is like a purchase after the consideration has been paid; and the value of the land agreed to be conveyed in exchange, at the time when the conveyance should have been made, is the measure of damages.³

ELEMENTS OF DAMAGE UNDER THE Milder Rule.—Where only nominal damages can be recovered for loss of the bargain, the vendee is entitled to recover his deposit, any payments he may have made on the contract of purchase, with interest, and expenses incurred in investigating the vendor's title.⁴ Nor will

¹ Drake v. Baker, *supra*.

² Bryant v. Booth, 30 Ala. 311. See Gale v. Dean, 20 Ill. 320; Dyer v. Dorsey, 1 Gill & J. 440; Pinkston v. Huie, 9 Ala. 252; Gibbs v. Jameson, 12 Ala. 820; Hammond v. Hannin, 21 Mich. 374; Thouvenin v. Lea, 26 Tex. 612; Taylor v. Rowland, *id.* 293.

³ Burr v. Todd, 41 Pa. St. 206; Faxon v. Davidson, 2 Duer, 153; Devine v. Heiner, 29 Iowa, 297; Bender v. Bombegger, 4 Dall. 436; Brown v. Dickerson, 12 Pa. St. 372; King v. Pyle, 8 S. & R. 166. See Lacy v. Marnon, 37 Ind. 168.

⁴ Walker v. Moore, 10 B. & C. 416; Pounsett v. Fuller, 17 C. B. 660;

Tyrer v. King, 2 Car. & K. 149. In McConnell v. Hall, 3 Penn. 53, a vendee paid down \$100 on a purchase of land, knowing at the time that the seller's agent had sold the land to another; on the seller being informed of the prior sale, he tendered back the \$100, but the vendee refused to accept it. In a suit by the vendee on the contract, he was held entitled to recover his payment, but without interest or costs, though the tender was not pleaded.

In Tyrer v. King, *supra*, an auctioneer entered into an agreement in behalf of A to sell certain premises to B, without having communicated to A that B was in treaty for

interest be allowed where possession under the contract of purchase has been enjoyed, except for such time as there is a liability for the profits to another person.¹ He may recover costs incurred, although not paid, if he makes allegation of them as *incurred* rather than as expenses *paid*;² and, among them, costs for searches relating to the title and for incumbrances, comparing the abstract with the deeds, and expense of journeys in the investigation of such title.³ He may also recover ex-

the premises; A had previously sold the premises to another party, and, therefore, could not fulfil the contract so made with B. B sued A for nonfulfilment of his contract. Held, that, under these circumstances, B was not entitled to recover damages for the loss of his bargain, but was entitled to recover £50 deposit and loss of the use, and his expense to his attorney.

¹Thompson v. Guthrie, 9 Leigh, 100.

²Richardson v. Chasen, 10 Q. B. 756. See Sutton v. Page, 4 Tex. 142, as to pleading.

³Hodges v. Earl of Litchfield, 1 Bing. N. C. 492. In this case, in the vendee's action, he alleged that he had been put to great charges and expenses, amounting in the whole to a large sum of money, to wit: to the sum of 1,000*l.*, in and about the negotiating and agreeing for the purchase of said estate, and having the same surveyed; and about the investigating the title to the said estate, and the existence and effect of the said supposed *modus* in the said article mentioned; and in and about his defense of and in a certain suit commenced and prosecuted by the defendant against the plaintiff in the court of chancery, for compelling a specific performance by the plaintiff of the said articles of agreement, and in which suit the bill filed by the defendant against

the plaintiff was dismissed by the same court, and in and about the making and performing of divers journeys, and otherwise respecting the said purchase; and also thereby the plaintiff lost and was deprived of a great part of the gains and profits which he might or would otherwise have made and acquired, from using and employing the said sum of 1,500*l.* so paid by him as aforesaid, and other moneys provided and kept by the plaintiff for the completion of the said purchase, etc. The damages in respect to each "head of claim" were ascertained by an arbitrator. It was held that the expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit, at a time when it is uncertain whether there will be any contract or not. The charge for a survey was also disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out. There was a charge of 7*l.* 11*s.* 6*d.* for journey to Stafford to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments. These were allowed.

Tindal, C. J., said: "Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily, and, for the same reason, the comparison of deeds with

penses for preparing title papers with a view to the conveyance of the title.¹ And, besides interest on the payments recovered back, he may likewise have interest allowed on money kept idle after the day for consummation of the purchase, pending an endeavor by the vendor to clear the title.² But he cannot recover for the expense he may have incurred in moving to the land, nor for improvements, whether of a permanent or temporary nature, or for repairs. The vendee expends money in his own wrong, if he takes possession and makes improvements before he has looked into the title and ascertained that it is likely to prove satisfactory.³ He cannot recover, it has been held, even for repairs;⁴ nor for expenses incurred prior to the contract; or of a survey, or for the preparation of conveyances before known objections to the title have been answered.⁵ Nor can he recover the difference between his costs, taxed as between party and party, and his costs between solicitor and client in an unsuccessful suit by the vendor for specific performance;⁶ or of costs of a suit by himself as purchaser for specific performance, where the bill has been dismissed without costs on the master reporting against the title.⁷ And where a purchaser, upon the delivery of

the abstract should be made early." Under the third head, 194. 4s. 11d. was claimed as plaintiff's costs as between attorney and client, ultra the costs as between party and party taxed to him in the suit in chancery. See *Sandbank v. Thomas*, 1 Stark. 306; *Jones v. Dyke*, Sugd. Vend. & Pur. Appen. 6; *Webber v. Nicholas, Ry. & Moo.* 419. In opposition, see *Hathaway v. Barrow*, 1 Camp. 151; *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins v. Beddalph*, 4 Bing. 160. Upon that claim the chief justice said: "We all think that the extra costs in chancery are not a damage which is a necessary consequence of the breach of this contract; . . . but the filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract."

¹ *McNair v. Compton*, 35 Pa. St.

23; *Dumars v. Miller*, 34 Pa. St. 319; *Malaun v. Ammon*, 1 Grant's Cas. 123.

² *Sherry v. Oke*, 3 Dowl. Pr. 349; *Metcalf v. Fowler*, 6 M. & W. 830.

³ *Peters v. McKean*, 4 Denio, 546; *Walker v. Moore*, 10 B. & C. 416; *Hertzog v. Hertzog*, 34 Pa. St. 418; *Worthington v. Warrington*, 18 L. J. C. P. 350.

⁴ *Bratt v. Ellis*, Sugd. App. No. 5.

⁵ *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492.

⁶ *Id.*

⁷ *Mulden v. Fyson*, 11 Q. B. 292. M agreed with F to purchase land of him. On production of F's title, M objected to it. F insisted that it was good, and gave M notice that he should sell at M's risk. M then filed a bill for specific performance, and the question of title was referred by the court of chancery to a master,

an abstract showing an apparently good title, resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale, there being nothing more on the part of the vendor than negligence in the preparation of the abstract,

who reported that F had not a good title, whereupon the bill was dismissed without costs on either side; that being the practice of the court of chancery in such cases. Held, that M could not recover from F, as damages for breach of the contract, costs incurred by M in the chancery suit.

Lord Denman, C. J., said: "The dismissal of the bill was a matter of course when the defendant appeared to want the power to perform his contract; and the refusal of costs to the defendant seems to have been required by justice, as the plaintiff's failure in his suit was occasioned by the defendant's incompetency to fulfil his own engagement. But the plaintiff has brought this action to recover, amongst other things, the costs to which he was put in the prosecution of his unsuccessful suit.

"Some of us thought that it might be important, in one view of the case, to inquire into the practice in chancery; and we cannot find or hear of any decision compelling the defendant to pay costs where the bill is dismissed in such a suit. We cannot, however, believe that the court of chancery does not possess the power to award costs to the plaintiff under circumstances involving fraud in any part of the negotiation; but without fraud the rule appears to be inflexible, that the unsuccessful plaintiff, though not liable to costs, does not recover them in chancery.

"The plaintiff asserts that these costs are the natural consequence of

the defendant's breach of contract, coupled with his threat to resell the estate, and as such are recoverable. He rests his claim on the practice of chancery, which, he contends, systematically lays these costs out of its consideration, and leaves them to be recovered in the action at law for the damages resulting from that breach of contract; and urges that if he cannot so make good his loss at the expense of him who caused it, he has no remedy. On the other hand, the general rule is set up, that the right to costs must always be considered as finally settled in the court where the question is adjudicated or to which it is accessory.

"Several cases were quoted to this effect. And this principle was admitted, in general, to apply; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other court. We are of opinion that this case falls within the same principle. The general rule of the court of chancery, a court having full discretion, must be intended to apply itself as an adjudication in every particular case which falls within it. In the case of *Hodges v. The Earl of Litchfield*, 1 Bing. New Cas. 492, in which the plaintiff claimed as damages extra costs of a bill for specific performance, Tindal, C. J., says: 'The extra costs in chancery are not a damage

and the purchaser being equally negligent in reselling before he had tested its accuracy.¹ So, where a vendor was prevented from performing by refusal of a third person to concur therein by accepting substituted security for an incumbrance, according to a previous parol promise; and negotiations were continued after breach of the contract, in the hope that some new arrangement might be come to, the expenses incurred to effectuate that abortive plan were not recoverable; they were held not sufficiently proximate.²

RECOVERY IN CASE OF PAROL CONTRACT.—In Pennsylvania, it was decided, in a late case, in an action for breach of a parol contract to convey land, that the plaintiff might recover the consideration paid, and compensation for improvements made in reliance upon the contract; less a reasonable charge for rent, unless there was fraud on the part of the vendor; and that the failure to convey was not such a fraud, although the vendor had power to convey.³ So in Texas, if a party make a parol agreement for the sale of lands, and put the purchaser in possession, and afterwards taking advantage of the contract being void by the statute of frauds, he is bound to pay for the improvements. If in such an agreement the vendor stipulates to pay for such

which is a necessary consequence of the breach of this contract.' 'The filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases.'"

¹ Walker v. Moore, 10 B. & C. 416.

² Sikes v. Wild, 4 B. & S. 421; S. C. 1 id. 587. In Pounsett v. Fuller, 17 C. B. 660, A agreed to sell to B the shooting on the manor of C. It being afterwards discovered that A had a mere equitable title, and C refusing to confirm, B brought an action against A for breach of the contract. *Held*, that he was only entitled to recover nominal damages and expenses incurred in the investigation of A's title; but not damages

for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavors to substitute a new contract on the failure of the original bargain. Jervis, C. J., said: "If it could have been established that the contract being about to go off, on the representation or suggestion of Fuller, the plaintiff's attorney had prepared the deed of covenant for the purpose of supplying the defect in the title, and of carrying out the original contract, that would have been an expense incurred in endeavoring to perfect a title which was imperfect, and the defendant would have been liable."

³ Harris v. Harris, 70 Pa. St. 170; Welch v. Lawson, 32 Miss. 170.

improvements, but no stipulation is made as to rents, on his refusal to complete the agreement, and he is sued for the improvements, the rents will not be allowed as a set-off.¹ Where a vendee goes into possession and makes valuable improvements under a parol contract, and specific performance is successfully resisted by the vendor, on the ground of the contract not being in writing, equity will in general decree compensation for improvements.² Where there has been no written contract of sale binding on the vendor, but the matter rests on the oral agreement, invalid by the statute of frauds, the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty as money paid upon a consideration that has failed.³ Where one owning a life estate in land makes a parol agreement to lease the same for a term of years, and dies before the term was to commence, and before a lease was executed, the other party is not entitled to recover for his disappointment from the administrator of the deceased, more than his actual damages, namely, money paid on the agreement and interest; he is not entitled to recover for the value of his bargain.⁴ If the owner of lands agree with another to give him a portion of the purchase money, and also a certain parcel of land for his services in effecting a sale of the land of the former, there being no note or memorandum in writing of the promise, the whole contract, as well for the money as the land, is void; and no action will lie for either. In such case the injured party has no remedy at law upon the contract; he may, however, ignore the contract, and maintain his action to recover back any money paid, and the value of the services rendered.⁵ But if the other party is able and willing to fulfil, the party paying in money or services has not the option to disaffirm the contract.⁶

¹Thouvenin v. Lea, 26 Tex. 612; Taylor v. Rowland, id. 293; Goodwin v. Lyon, 4 Port. 297. See Lester v. Batson, 6 Kan. 420.

²Thomas v. Kyles, 1 Jones' Eq. 302; Goodwin v. Lyon, 4 Port. 297; Boze v. Davis, 14 Tex. 331; Albea v. Griffin, 2 Dev. & B. Eq. 9; Herring v. Pollard, 4 Humph. 362; Mathews v. Davis, 6 id. 324; Parkhurst v. Van

Courtlandt, 1 John. Ch. 273. See Cook v. Doggett, 2 Allen, 439.

³Id.; Nicholson v. Wadsworth, 2 Swanst. 387. See Welch v. Lawson, 32 Miss. 170; Hertzog v. Hertzog, 34 Pa. St. 418.

⁴McClowry v. Croghan's Adm'r, 31 Pa. St. 22.

⁵Fuller v. Reed, 38 Cal. 99.

⁶Shaw v. Shaw, 6 Vt. 69.

ELEMENTS OF DAMAGE WHERE *FLUREAU v. THORNHILL* DOES NOT APPLY.—Where damages for loss of the bargain are recoverable by the vendee, he is entitled to recover the difference between the contract price and the actual or market value of the land at the time when the conveyance should have been made, whether then enhanced by improvements or otherwise; and all other damages which result from the vendor's breach of the contract; further, he must place his vendee, as near as money can do so, in the same position in which he would have been if he had obtained that for which he contracted.¹ This rule applies to one who undertakes to procure conveyance from another and fails on account of the refusal of that person;² and also to one who assumes, without authority, to act as agent for the owner, and makes a contract as agent to convey.³ The vendee may not only recover back any payments he may have made, with interest, and expenses of investigating the title, but damages with reference to an enhanced value which the vendee could make on a resale, pursuant to an actual contract;⁴ or caused by improvements made by such vendee.⁵

Expenses incurred in getting a survey made of the estate, or plans prepared preparatory to the making of the contract, but before the contract was actually entered into, cannot be recovered by the purchaser; nor can the expense of a conveyance prepared before the title has been approved of, and before it is known whether objections raised to the title can be answered by the vendor.⁶

¹ *Allen v. Atkinson*, 21 Mich. 351; *Cannell v. McLean*, 6 Har. & J. 297; *Hopkins v. Yowell*, 5 Yerg. 305; *Dustin v. Newcomer*, 8 Ohio, 49; *Trull v. Granger*, 8 N. Y. 115; *Engel v. Fitch*, L. R. 3 Q. B. 314; S. C. L. R. 4 Q. B. 659; *Martin v. Wright*, 21 Ga. 504; *Cox v. Henry*, 32 Pa. St. 18; *Burr v. Todd*, 41 id. 206; *Foley v. McKeegan*, 4 Iowa, 1; *Pumpelly v. Phelps*, 40 N. Y. 59; *Drake v. Baker*, 34 N. J. L. 358; *Godwin v. Francis*, L. R. 5 C. P. 295; *Sweem v. Steele*, 5 Iowa, 352; *Case v. Wolcott*, 33 Ind. 5.

² *Gale v. Dean*, 20 Ill. 320.

³ *Godwin v. Francis*, L. R. 5 C. P. 295; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Gibbs v. Jamison*, 12 Ala. 820; *Hammon v. Hannin*, 21 Mich. 374.

⁴ *Engel v. Fitch*, Law R. 3 Q. B. 314; *Godwin v. Francis*, L. R. 5 C. P. 295; *Hopkins v. Grazebrook*, 6 B. & C. 31.

⁵ *Witherspoon v. McCalla*, 3 De-saus. 245; *Thompson v. Kelcrease*, 14 La. Ann. 340; *Winters v. Elliott*, 1 Lea, 676.

⁶ *Hodges v. Earl of Litchfield*, 1 Scott, 443; 2 Add. on Cont. § 529.

Where the vendor's title is imperfect, and he is for that reason unable to perform his contract of sale, but the vendee has perfected the title by extinguishing an incumbrance, or buying in an adverse title, his damages will be limited to his outlay for this purpose.¹ And he can charge no more to the vendor for moneys expended in perfecting the title than would otherwise be recoverable for breach of the contract as damages.²

RIGHTS OF DEFAULTING VENDEE.—A vendee who, after part performance, makes default, and the sale, in consequence, fails to be consummated, is seldom entitled to any relief or compensation for such part performance. A deposit or part payment cannot be recovered back by the vendee where the sale goes off by his default.³ The vendor in such cases may have in his hands a sum paid to him on the contract of purchase largely in excess of the damages that could be assessed in his favor for loss of the bargain. He can retain it because, while the contract subsists, the defaulting party cannot recover it back, or any equivalent in damages, unless the vendor is placed in default.⁴

But where the contract is determined by the act of the vendor, even for the vendee's default, according to the English

¹ *Kerley v. Richardson*, 17 Ga. 602; *Baker v. Corbett*, 28 Iowa, 317. But compare *Martin v. Atkinson*, 7 Ga. 228.

² *Spring v. Chase*, 22 Me. 509; *Foote v. Burnett*, 10 Ohio, 334; *Dimmick v. Lockwood*, 10 Wend. 142; *Donohoe v. Emery*, 9 Met. 68; *Davis v. Lyman*, 6 Conn. 255; *Cox's Adm'r v. Henry*, 32 Pa. St. 18.

³ *Ex parte Barrell*, *In re Parnell*, L. R. 10 Ch. App. 512; *Ketchum v. Evertson*, 13 John. 365; *Green v. Green*, 9 Cow. 46; *Battle v. Rochester City Bank*, 5 Barb. 414; *Davis v. Hall*, 52 Md. 673; *Estes v. Brown*, 11 Tex. 237; *Fuller v. Hubbard*, 6 Cow. 13; *Hudson v. Swift*, 20 John. 24; *Gillet v. Maynard*, 5 John. 85; *Roach v. Waid*, 2 T. B. Mon. 142; *Essex v. Daniell*, L. R. 10 C. P. 538; *Power v. North*, 15 S.

& R. 12; *Frost v. Frost*, 11 Me. 235; *Rounds v. Baxter*, 4 Greenlf. 454; *Page v. McDonnell*, 46 How. Pr. 52; *Haynes v. Hart*, 42 Barb. 58. In *Bullock v. Adams*, 20 N. J. Eq. 367, 374, Chancellor Zabriskie said: "It is common both in sales at auction and other sales, to stipulate that the percentage or part paid on the contract shall be forfeited if the purchaser does not comply with his contract, and I am not aware of any case where the payment so made has been recovered at law, even where the vendor, upon resale, has received a higher price. I know of no principle upon which such payment can be recovered either at law or in equity."

⁴ *Martin v. McCormick*, 4 Sandf. 366.

doctrine, the question whether a deposit is forfeited depends on the intention of the parties. A agreed to demise a house to B for a term in consideration of 300*l.* then paid "by way of deposit, and in part of 5,500*l.*," the whole purchase money; possession to be delivered and accepted on a day named; B agreed to accept the demise, but on the day fixed therefor refused; A afterwards disposed of the house to a third person. This agreement contained a clause providing for a penalty of 1,000*l.* to be paid by either party making default. And being silent in respect to forfeiture of the deposit in case of the vendee's default, it was in this case held not forfeited, because there was evidence in the agreement of a different intention. Lord Denman, C. J., said: "The ground on which we rest this opinion is that in the absence of any specific provision, the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument; but as this imposes on either party that could make defense a penalty of 1,000*l.*, the intent of the parties is clear that there should be no other remedy. . . . The consequence appears to be that this vendor may sue for the penalty and recover such damages as a jury may award; but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but in part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser."¹ If the agreed deposit has not been paid it cannot be recovered as such when the vendee has refused to perform—even if the intention is manifest that in that event the deposit shall be absolutely forfeited. One of the conditions of a sale² was that, should the purchaser neglect or fail to comply with any of the conditions, his deposit money should be actually forfeited to the vendor, who should then be at liberty to resell the property at public auction or private sale; and if the amount or price obtained on the second sale should not be sufficient to cover the amount bid at the present sale, with all the expenses incidental to it, the deficiency to be paid by the defaulter to the vendor. The deposit

¹ *Palmer v. Temple*, 9 A. & E. 503;
36 E. C. L. 181.

² *Ockenden v. Henley*, E. B. & E.
485.

was not paid, and on resale a less sum than the defendant's bid was realized; and in an action on the contract, Lord Campbell, C. J., said: "There having been an actual forfeiture of the deposit, by the express words of the seventh condition, the deposit, if paid, could not in any event be recovered back by the purchaser; and the seller would have been entitled to any additional benefit on a resale. But the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the resale, it becomes necessary to consider what was the nature of the deposit. Now it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment of part of the purchase money, and not as a mere pledge.¹ Therefore, in this case, had the deposit been paid, the balance only of the purchase money would have remained payable. What, then, according to the . . . condition is the deficiency arising upon the resale which the seller is entitled to recover? We think, the difference between the balance of the purchase money on the first sale, and the amount of the purchase money obtained on the second sale; or, in other words, the deposit, although forfeited, so far as to prevent the purchaser from recovering it back, as without a forfeiture he might have done,² still it is to be brought by the seller into account if he seeks to recover as for a deficiency on a resale."

Under a contract with a like condition in another case,³ where the deposit had been paid, but there had been no resale, Lord Coleridge, C. J., said: "The deposit, therefore, is absolutely forfeited, and the vendor is at liberty, not bound, to resell; and may recover against the purchaser any deficiency on the second sale, together with the expenses of the abortive sale. The property not having been resold, in this case, the expenses to which the vendor has been put with reference to the abortive sale are recoverable from the purchaser, plus the deposit money. The case of *Ockenden v. Henley*⁴ has been referred to; but the circumstances of that case, which are somewhat complicated, are

¹ Sedg. on V. & P. See III, art. 18 (13th ed.).

³ *Essex v. Daniel*, L. R. 10 C. P. 538.

² *Palmer v. Temple*, 9 A. & E. 508; S. C. 36 E. C. L. 181.

⁴ E. B. & E. 485.

wholly different from those of the present; the deposit had never been paid, and the action was brought for the loss on the resale, and the expenses of the resale; these expenses formed part of the deficiency on the resale, occasioned by the default of the purchaser, and the loss on the second sale would be the deficiency of price and the expenses."

CONFLICT OF THE CASES IN THIS COUNTRY.—There is much conflict in the American decisions as to a purchaser's rights in respect to payments made on a contract of purchase, after the vendor has put an end to such contract for the vendee's default. One class of cases holds that, under such circumstances, the payments made are forfeited and lost; and another, that the putting an end to a contract by the vendor for such cause is a rescission, and entitles both parties to be put in *statu quo*. In a case of the former class, the contract contained this clause: "And in case of failure on the part of said party of the second part to make either of the preceding payments when due, or in any respect to fulfil this contract, the same shall become void on such failure, if the party of the first part shall elect to rescind it, and on his previously giving notice of at least thirty days of such election; . . . and besides, the party of the second part shall, in case of such failure and consequent rescinding of the contract, forfeit \$100, as the ascertained and liquidated damages, and shall retain no legal or equitable interest in the premises after this contract is rescinded." There was afterwards default, rescission by notice, and surrender of possession. Welles, J., said: "The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate where the contract has been rescinded, are, first, where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either; second, where the vendor is incapable or unwilling to perform the contract on his part; or third, where the vendor has been guilty of fraud in making the contract. In either of those cases it would be against equity and conscience for the vendor to retain the money, and the law implies a promise on his part to refund it. But in a case where the vendor has in all respects performed his part, and the rescission is entirely in consequence of the un-

excused default of the vendee in making further payment, to allow him to recover back the money paid, would, in my opinion, be little short of offering a bounty for the violation of contracts.¹ But in a subsequent case, in the same state, it was held that where a vendor, in pursuance of a right reserved in the contract of sale, declares the contract void, and re-enters and takes possession of the lands, and sells the same to another person, the contract is rescinded; and the vendee may recover back payments made by him in an action for money had and received.²

On principle, if a contract is rescinded by the vendor, even for the vendee's default, the vendor should restore what he has received upon it; and this view is believed to be sustained by the weight of authority.³ Even if the contract shows that the parties intended that, on default of the vendee, all previous payments should be forfeited, and the contract declared void, at the vendor's option, this intention should be disregarded for the same reasons that govern in other cases of penalties.

ADJUSTMENT OF COUNTER DEMANDS ON RESCISSION.—In Kentucky, where the vendee recovers against the vendor purchase money and interest as damages for breach of a covenant to convey lands, there can be no deduction at law for rents and profits received by the covenantee. If the covenantee has had possession, has taken the rents and profits, has made improvements, or has committed waste; these things are too complicated for a jury, and properly belong to chancery and must be settled there.⁴ In that state, whether a judgment at law be given for either vendor or vendee, and whether the vendee is entitled to recover only consideration paid and interest, or enhanced damages by reason of the vendor's fraud or wilful

¹ Battle v. Rochester City Bank, 5 Barb. 414. See Ashbrook v. Hite, 9 Ohio St. 357.

² Utter v. Stuart, 30 Barb. 20; 2 Hill, 288; Lawrence v. Simons, 4 Barb. 354; Fancher v. Goodman, 29 id. 315; Ellenwood v. Fitts, 63 Barb. 321; Feay v. Decamp, 15 S. & R. 227; Gilbreth v. Grewell, 13 Ind. 484;

Burge v. Cedar Rapids, etc. R. R. Co. 32 Iowa, 101; Franklin v. Miller, 4 A. & E. 599; Hunt v. Silk, 5 East, 449; Beed v. Blandford, 2 Younge & J. 278; McCarty v. Moorner, 50 Tex. 287.

³ Id.

⁴ Combs v. Tarlton's Adm'r, 2 Dana, 464 (1834).

default, it may be suspended by a suit in equity until there has been an adjustment in the latter forum of rents and profits, compensation for improvements or waste; and the amount of the judgment will be subject to equitable deductions which result from that adjustment.

The rule on these subjects appears to be the same, in such cases, as upon rescission in equity of the contract at the instance of either party.¹

¹In *Wickliffe v. Clay*, 1 Dana, 585, it was decided that where one in possession of land, held *bona fide* as his own, has erected buildings thereon, he or those claiming under him may remove them without incurring any responsibility to the owner of the paramount title.

If one buys land with buildings upon it, which he moves off, and then loses the land by a better title appearing, his vendors, upon a rescission of their contract, will be entitled to retain out of the consideration to be restored, the value of the buildings so removed, assessed at their value when removed; not their estimated value at the time of the sale, but so much as they would have been worth—preserved with common care—as additions to the land at the time of the erection, and equivalent to what the occupant could have recovered for them of the successful claimant. And where the removal was without the consent or privity of the party against whom the decree for restoration of the purchase money is obtained, he may, because of the difficulty of the proof, elect to return the value of the buildings, according to the above rule, or as movable structures.

The use of land, and the interest on the consideration paid for it, are, in general, to be considered equivalent, and to be set off against each other. But, as the evictor may re-

cover for mesne profits for five years, the party evicted is entitled to interest for the same time on the consideration recovered back from his vendor, and such vendee should pay interest on so much of the consideration as was unpaid while he held possession. *Williams' Heirs v. Wilson*, 4 Dana, 507 (1836). Part of the consideration remaining unpaid, the purchaser was required to account for the same proportion of the total value of the rents that the unpaid part bears to the whole consideration.

Richardson v. McKinson, Litt. Sel. Cas. 320 (1821): Where a vendee of land has been let into possession, and the contract of sale has been rescinded on account of the misrepresentations of the vendor, and his inability to make a good title, the vendee cannot be compelled to pay rent, beyond the profits actually received.

In such a case, an inquiry how much the premises would have been reasonably worth, annually, to a man of ordinary industry and diligence, is alike unnecessary and irrelevant.

In such a case, the vendee will be entitled to pay for the improvements made by him when the premises go out of his hands into the hands of the vendor.

Caldwell's Heirs v. White, 4 T. B. Mon. 561: Where the vendee rescinds the contract he must account for

ADJUSTMENT OF COUNTER EQUITIES IN SPECIFIC PERFORMANCE.—

The manner of accomplishing such adjustments is not everywhere the same; but there is uniformly recognized the elements

the rents from the date of his purchase.

Gaines v. Bryant, 4 Dana, 395: Where the possession is wrongfully withheld from a vendee, he is not obliged to pay interest on purchase money due.

Barnett v. Higgins, 4 Dana, 565 (1836): A purchaser who had received the possession, but failing to get a title had recovered judgment against his vendor for the purchase money and interest, is accountable in equity to the vendor for the rents and for waste, and is entitled to pay for improvements. And if he is allowed in the adjustment for improvements made by him in clearing land, etc., at their value when first made, he should be charged with the rent of them as well as for those which were on the land when he entered.

In adjusting an account of rents, improvements, etc., for a decree, the rents were computed up to a certain time, and decree rendered for the balance; the cause was then appealed, reversed and remanded, with directions to ascertain, by a commissioner, the value of the use, not before included, of certain improvements, and also the amount of rents, of waste, etc., accrued after the period to which the accounts were brought down, in the former adjustment, and up to the time when the purchaser would relinquish the possession, and for a decree for the balance so ascertained.

Stephenson v. Harrison, 3 Litt. 171 (1823): Where a man covenants to convey land to which he knows he has no title, and to deliver possession on a particular day, the value of the

land on the day the possession was to have been delivered, with interest, is the measure of damages.

Judgment at law had been recovered for the purchase money, and a bill in equity was filed for compensation for failure of title to part of the land.

The court say: "Here it is apparent that Harrison not only had no title to the tract, . . . but that, prior to his sale to the complainant, he must have had a perfect knowledge of Hays' right; and, although the sale was for 3,100 acres, including the tract of Hays, it is in proof that the 400 acres of Hays formed such an essential inducement to the purchase, that, without the separate and specific covenant of Harrison for that part, the complainants would not have completed the purchase. Besides, the proof is satisfactory that the tract of Hays is in value greater than an average 400 acres, and was so considered by the complainant when making the purchase, and, after selling the land, Harrison, for an adequate sum, might have obtained from Hays his 400-acre tract.

"The failure of Harrison to comply with his covenant thus made, and which might have been thus fulfilled, instead of being the result of an honest inability to perform his undertaking, must be ascribed to a wilful and fraudulent intention not to comply with his stipulations in relation to the tract of Hays, and ought to subject him to the complainant's demand for compensation, in a sum equal to the value of the tract of Hays, together with the accruing interest thereon. The

which may be involved. The general principle is, that he who withholds possession after it is his duty to deliver or surrender it, shall make compensation to the party to whom such delivery

value should be ascertained by the inquest of a jury, who, in their inquiry, ought to be confined to the 1st of October, 1817, the time when, by the covenant of Harrison, the possession of Hays' tract was to be delivered to the complainants."

In *Combs v. Tarlton's Adm'r*, 2 Dana, 464 (1834), Judge Underwood said: "Where the profits of the land in the possession of the vendee are of more value than the interest of the money enjoyed by the vendor, it is utterly unjust to allow the vendee to recover the purchase money with its interest, and to hold the profits of the land. If the vendee is evicted by an adverse paramount claim, and becomes responsible to the evictor for the *mesne profits*, then he ought to recover interest from his vendor for as many years as he is or may be required to account to the evictor for the profits. But where the vendee is not bound to account for the profits of the land to any one, and where, as in this case, the profits greatly exceed the interest of the purchase money, manifest injustice would result from permitting the vendee to recover interest, and likewise to keep the profits. The principle upon which all contracts ought to be *rescinded* is, that the parties should be placed in *statu quo*. If the contract between the vendor and the vendee is set aside by the chancellor, he would never give interest to the vendee, and allow him also to keep the profits. On the contrary, he would say to the vendee: 'As you have enjoyed all you contracted for, and as the profits of the land are as valuable, or more so, than the interest on the purchase money, you shall not have both; but if you require a restoration of the purchase money and interest, you must restore, on your part, the land and its profits; but as by the contract you and the vendor regarded the land and purchase money equivalent to each other, I (the chancellor) will regard the use of each as of the same value, and take no account between you for interest or profit.' This doctrine—where the land yields a profit, or can be made, by such care, attention and management as proprietors usually bestow, to yield a profit equal to the interest on the purchase money—is sustained by the clearest principles of reciprocal justice. But where the land yields no profit, and cannot be made to yield any, without the expenditure of money, or labor, or both, then there may be strong reasons for insisting, in case the contract be rescinded, that the purchase money with its interest should be restored by the vendor. In such a case, the vendee generally regards the prospect of a rise or appreciation in the price of land as the equivalent or consideration which he receives for the interest on the purchase money; and if he cannot, in consequence of the default of the vendor, get the land, being deprived of the contemplated rise which constituted the leading motive for the contract, and, receiving no esplees or profits, the land not being in condition to yield any, justice would require the restoration of the purchase money with interest upon a rescission of the con-

or surrender was due, for benefits received from such possession, while withheld, or the value of the use; and for waste or deterioration resulting from his acts or neglect. After the pur-

tract. The cases first decided by this court were, in all probability, of this description.

"Whether the rules which would govern in chancery can be applied with safety to a trial at law, has been a subject of much consideration with the court. The rules of right ought to be the same in every tribunal, and should be applied so as to settle controversies with all practicable speed. To avoid the expense and delay of another suit would be desirable, if insuperable objections did not present themselves. There are, however, too many questions growing out of the rescission of a contract between vendor and vendee put into possession, to allow them to be considered and settled by a jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of the land; for waste and damage, and against these claims the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters, the chancellor is more competent to administer justice than the common law judge, aided by the hasty inquiry of a jury. We shall therefore leave the rule of the law to stand as we found it, and as recognized by the case of *Cox's Heirs v. Strode*, 2 Bibb, 273. The vendee is entitled to his judgment at law for the amount of purchase money and interest, and then the vendor may resort to the chancellor for a settlement of the rents, profits, waste and improvements, and for such decree as equity requires."

Cornish v. Stratton, 8 B. Mon. 586;

Cornish sold *Stratton* three tracts of land, on one of which was a grist mill and a saw-mill. The purchase money having been paid, the vendee brought an action of covenant against the vendor, alleging a failure to convey. *Cornish* filed a bill for specific performance, and restraining the action at law. This bill was dismissed, but without prejudice to any claim the vendor might have for rent or waste. The vendee proceeded with his action and obtained judgment for the consideration and interest, \$3,000. After the recovery of this judgment, the vendor filed a bill setting forth the foregoing facts, alleging waste by negligent burning of the mills and otherwise; that the rental value of the mill was \$500 per annum; also that the vendee was unable to pay the rent and damages for waste, unless by set-off of his judgment; there was a prayer for injunction against that judgment which was awarded him, and a rescission of the contract.

The destruction of the mills was found to have resulted from a want of reasonable care and attention on the part of the vendee. He was held responsible for the loss, and the amount deducted from the judgment; as to the residue, the injunction was dissolved. The vendee, in his action at law, recovered a judgment for \$149 more than the *ad damnum* in his declaration, and he remitted it. But in the final adjustment the vendor was required to pay it to do equity. *Williams' Heirs v. Wilson*, 4 Dana, 597 (1836). The general rule, according to

chaser is entitled to possession, if the vendor retain it or prevent its delivery to the purchaser, he is entitled to compensation for the loss. He will be allowed the value of the rents and profits; and where these are less than the interest on the purchase money, the latter instead will be allowed.¹ From the date of the contract, everything which forms part of the inheritance belongs in equity to the purchaser; and if severed and converted by the vendor, he is bound to make compensation, either on the basis of the value of the severed property, or the diminished value of the land, according to the circumstances.² There is an interesting discussion of this liability in a New York case.³ P contracted to convey certain lands to the plaintiff, but conveyed them instead to the defendant M, who had knowledge of the prior agreement. The plaintiff, in 1844, filed his bill in chancery to compel a specific performance of the agreement, and obtained a decree. This decree directed a reference to a master to ascer-

former decisions (*Cogswell's Heirs v. Lyon*, 3 J. J. Marsh. 41; *Morton's Heirs v. Ridgway*, 3 J. J. Marsh. 254; *Taylor v. Porter*, 1 Dana, 421), is, that where a contract for the sale of improved land of which the purchaser has had possession, is rescinded, the use of the land and interest on the purchase money shall be deemed equivalents, constituting set-offs one against the other. But there are many cases where this rule would not be equitable, and would not, therefore, be applied, e. g., where the sale was of wild land — where much of the tract was unimproved, and especially where the purchase was not made with a view of deriving profit from the use of the land. In such cases, the interest would be decreed to the purchaser with the purchase money, deducting the value — if anything — of the use of the land, provided money was paid; and he was not chargeable with improper delay in requiring the legal title, or a rescission.

There has never been any universal rule for adjusting and setting off rents against interest upon rescission of a sale of lands. As cases vary, the equity of allowing rents and interest must vary — the object in every case being to place the parties as near as possible in *statu quo*.

¹ *Id.*; *Esdale v. Stephenson*, 1 Sim. & K. 122; *Jones v. Madd*, 4 Russ. 118; *Burton v. Todd*, 1 Swanst. 255.

² *Caldwell's Heirs v. White*, 4 T. B. Mon. 561; *Robertson v. Skelton*, 12 Beav. 260; *Dyer v. Hargrave*, 10 Ves. 506; *Barnett v. Higgins*, 4 Dana, 565; *Combs v. Tarlton's Adm'r*, 2 Dana, 464; *Cornish v. Stratton*, 8 B. Mon. 586; *Shawhan v. Long*, 26 Iowa, 488; *Gaines v. Bryant*, 4 Dana, 395; *Hepburn v. Dunlap*, 1 Wheat. 179; *S. C.* 3 Wheat. 231; *Bolling v. Lersner*, 26 Gratt. 36. See *Burgell v. Bissell*, 14 Barb. 638.

³ *Warrall v. Munn*, 38 N. Y. 137.

tain the amount of damages sustained by the plaintiff by reason of having been kept out of possession, and by reason of waste committed by defendant M. The purchase money was paid by the plaintiff, according to the decree, and P executed and tendered a conveyance of the premises, but defendant M continued in possession, pending sundry appeals, until 1859. These appeals related to the question of damages as found and assessed, first, by the master, and subsequently by a referee appointed by the court. It was also a part of the case, and it appeared in evidence, that the lands were of little value for agricultural purposes, and were purchased by the plaintiff for the manufacture of brick. It was held: 1. That the general rule which allows to the vendor the interest on the purchase money, and to the purchaser the rents and profits, failing here to apply as an equitable remedy, because of the peculiar circumstances of the case, the equitable indemnification of the plaintiff for being kept out of possession is found in allowing him as damages an annual sum equal to the interest on the purchase money paid by him. 2. He should be allowed the damages sustained by the deterioration from waste committed by the defendant. 3. These should be continued down to the time when the plaintiff was let into possession. 4. Upon the damages caused by being kept out of possession, interest should be computed on each actual amount from the end of each year down to the time of the assessment or report; and upon the damages caused by waste, only from the time when the plaintiff was let into possession to the time of the assessment or report.¹

¹ Woodruff, J., said: "The present case is peculiar in two respects, viz.: first, the purchase money, with the interest thereon, was payable, and was properly decreed to be paid to the defendant Pratt, the original owner and vendor of the premises, who acquiesced in the decree and executed a deed in obedience to its requirements, while the possession was held by the defendant Munn; and second, the principal value of the lands consisted in the deposits of clay, adapted by the consumption

thereof to the manufacture of brick on the premises. The inapplicability of the general rule above stated, to land of this description, may be rendered quite apparent by an illustration closely analogous to the present. For example, suppose a sale of land, of no value for ordinary use, became incapable of cultivation, and entirely unsuited to pasture, and yet by reason of a bed of valuable ore of very large value, and for that sole reason, sold at a large price. On a decree for specific perform-

ance, shall the purchaser be charged with interest on the purchase money for the period during which he is kept out of possession, and the vendor pay nothing (because the rents and profits are nothing) for depriving the purchaser of the opportunity of working the mine or ore bed during the period of delay? Or, if the purchase money has been paid, shall the vendor, who has enjoyed the use of the purchase money, have the advantage of his own wrong, and make no compensation to the purchaser for his loss of opportunity? The answer must be, not so; unless the rules of equity are so imperfect that such injustice cannot be prevented.

"Does it follow that the damages are to be ascertained by inquiring what profits the purchaser could have made by working the mine? That question is in substance this: Was the referee right, on the first reference in the present case, in inquiring how much the plaintiff might have received for the privilege of making brick on the land, thereby exhausting the bed of clay, which in fact now remains to him to be worked presumptively with equal benefit, and thereupon allowing the plaintiff interest on such possible receipts from year to year as damages for the delay? This mode of estimating his damages proceeded upon the ground, not that the plaintiff lost the clay beds (which constituted the chief value of the land), but that he lost the opportunity of converting them into money so soon as perhaps he might have done, if he had obtained the possession when he was entitled thereto.

"I find no warrant for any such speculative rule or measure of damages; no case is cited to us, and I

think it may be safely averred that no case can be found in which such a rule was adopted. No analogy can be found in any rule of assessment of damages at law. The rule, then, is the value of the use, not the profits of the consumption of the property detained, when in fact the entire property is restored to the plaintiff's possession. . . .

"The plaintiff offered to prove that he purchased for the express purpose of devoting it to the making of brick, and to converting its contents into money. Now suppose the plaintiff, although he had contracted to pay therefor a large sum, had in fact paid no part of the purchase money, and he was now to be put in possession, and permitted to carry into effect the purpose for which he bought the property. He would be completely indemnified against loss by relieving him from the payment of interest. True, he would fail to realize, at so early a day as he anticipated, the profits of his bargain, but he has now that chance of profits, and meantime he has had the use of the purchase money. In short, the general rule which allows to the vendor the interest, and the purchaser the rents and profits, failing to apply, because, from the character of the land, there are no rents and profits, or an amount grossly inadequate to a just indemnity, the purchaser is equitably entitled to be indemnified, if any definite and certain mode can be found by which to ascertain it. Relief from the payment of interest is, in such a case, palpably the most obvious, as it is the most equitable, mode of doing so. For, otherwise, the vendor is permitted to profit by his own wrong, and the purchaser compelled to submit to a certain loss. . . .

"But it is one of the peculiarities

of this case that the purchase money and interest was due to the defendant Pratt, and has been paid while the defendant Munn has been in possession, and, during the period of litigation down to 1859, at least, has kept the plaintiff out of possession. The plaintiff has lost the interest on the purchase money, and the nature of the property is such that there can be no measure of damages founded on the rents and profits, or the value of the use of the premises, which furnishes any indemnity. Within the principle of the cases referred to, and, as I think, in most just conformity to reason and equity, the defendant should be charged with the amount of that interest as damages down to the time when the plaintiff was let into possession."

The question whether the damages for waste committed by a vendor pending a contract of purchase should be measured by the injury to the inheritance occasioned thereby, or by the value of the materials taken from the premises, or where timber has been cut, or stone has been quarried, or earth removed by him; or whether either method may be adopted in the ascertaining the damages, was not particularly considered in the opinion from which the foregoing quotation has been made. The judgment directed that in ascertaining the damage sustained by reason of waste committed by the defendant, the court should allow to the plaintiff the "actual value of the clay and sand taken from the premises by the defendant, and of any timber or trees cut thereon and removed by him, with interest on such value from the time the plaintiff was let into possession until the time of the assessment. The damages were subsequently assessed in accordance with the judgment, and

judgment was given for the same. This judgment having been affirmed at general term, the defendant again brought the case, by appeal, before the court of appeals. The defendant asked reversal on the ground that the rental value of the premises for ordinary purposes of husbandry is the only criterion of damages for keeping the plaintiff out of possession; and that the diminished value of the land, and not the value of the materials taken therefrom, should be adopted as the measure of compensation to which the plaintiff was entitled for the injury in the nature of waste committed. It was held that the assessment was in strict conformity to the directions given on the former appeal, and that the judgment should be affirmed on the principle of *stare decisis*, unless there was a plain error committed by the court in giving those directions. The principles laid down in the former opinion were reaffirmed in respect to the right to assess damages down to the time of assessment and to the adoption of interest on the purchase money paid as a measure of damages for the plaintiff being kept out of possession. On the other question, Andrews, J., said: "It is not denied that the defendant is liable to the same extent as the vendor would have been. He entered under a contract with him, and with notice of the plaintiff's rights; and the waste was committed *pendente lite*. It is clear, I think, that the deterioration in the value of the land would be an appropriate method of fixing the amount of the injury. In some cases it would be the only way in which compensation for waste could be given, in view of the nature of the plaintiff's interest and the character of the injury. A mortgagee or lienor could only re-

If the vendor retains possession as security for the purchase money pending a question incidental to specific performance, where that relief as to the principal part of the land is not disputed, but mutually contemplated, such vendor will be charged in respect of that possession like a mortgagee in possession.

In an English case,¹ a dispute arose between trustees for a deceased vendor, and a purchaser; the purchaser claiming to be

cover on proof that his security was rendered inadequate by the injury to the freehold. If the soil, having no value separate from the land, was stripped from it, so as to render it unproductive, and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation. So, also, where trees designed for shade or ornament have been cut down, whereby the value of the land has been greatly lessened. And in cases of permissive waste, where a purchaser has been kept out of possession, and the land has suffered from lack of cultivation, the court would compel an allowance to be made by the seller for the injury to the land. (*Foster v. Deacon*, 3 Madd. 394; 3 Sugd. on V. & P. 133.) But the diminished value of the land is not the exclusive measure of relief for an injury in the nature of waste committed by a wrongdoer on the land of another. In many cases it would substantially exempt him from responsibility. Cutting a few trees on a timber tract, or making a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal, severed from the soil, might be considerable. The wrongdoer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it

was taken was, as a whole, worth as much as it was before (*Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Bennett v. Thompson*, 13 Ired. L. 146). The liability of the vendor who, pending a contract of purchase, commits waste upon the premises by cutting timber trees, or removing stone, sand or clay therefrom, to pay or account to the purchaser for the value thereof, results, I think, from the principle that in equity everything which forms a part of the inheritance belongs to the purchaser from the date of the contract. The purchaser is deemed in equity to be the owner of the land, and a court of equity will, in an action for specific performance, adjust the respective rights and liabilities of the parties upon this assumption. I am satisfied that the judgment declaring the defendant liable for the value of the sand, clay and timber taken by him from the premises was not inadvertently pronounced, but is supported by reason and authority; and I shall content myself by citing some authorities bearing on the subject, without further discussion: *Nelson v. Bridges*, 2 Beav. 239; *Attersol v. Stevens*, 1 Taunt. 183; *De Visme v. De Visme*, 1 Macn. & G. 336; *Dart on V.* 116; 3 Sugd. on V. 134; *Paine v. Miller*, 6 Ves. 349; *Mooers v. Wait*, 3 Wend. 104."

¹ *Phillips v. Silvester*, L. R. 8 Ch. App. 173.

entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase money remained unpaid, and in the meantime the rest of the land was allowed to lie waste; it was held that the purchaser should be allowed to set off against the interest payable by him the amount which might have been received, and the amount of deterioration. The lord chancellor said: "By the effect of the contract, assuming there to be no ground on either side for simply setting it aside, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money right to receive the purchase money, he retaining a lien upon the land which he has sold until the purchase money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended; then, is not such a person so entering into possession answerable, when the account under the security comes to be taken, for not keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor, who insists upon continuing in possession of the land over which he has security, the contract being one which, in the view of a court of equity has changed the title of the land,—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a farther security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditures, for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until

payment of the purchase money is made and the conveyance is accepted. He has that right; but the question is, upon what terms that right is to be exercised. It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person.¹

¹The further remarks of the lord chancellor are important. He said: "The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to show that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim, if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to show, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to show or suggest, that the purchaser was not a person who could be made responsible for anything that might be due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right, and were doing nothing wrong in insisting as they did, upon retaining possession until the purchase money was paid; yet, on the other hand, I cannot admit that that is any reason why they should be

exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears, they would have incurred no risk in allowing possession (the purchase money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say: 'The time has come when you might have taken, and ought to have taken, possession, and therefore you must bear the consequences of all the subsequent deterioration;' and in another breath say: 'We have a right to refuse you possession, and we choose to exercise that right.' Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this: that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever, that if in this particular case the plaintiff had sent to Mr. Silvester and had said: 'We are perfectly willing to let you go into possession subject to the question between us,' and Mr. Silvester had said in reply: 'I am willing to take possession, but

. . My opinion is, that, in that state of things, there being proof of careless, and, I must say, of wantonly negligent, conduct on the part of the plaintiffs, which has caused serious dilapidations, I cannot differ from the master of the rolls, or see any reason to alter his lordship's order in this respect." The order of the master of the rolls was that the plaintiffs have the balance of the purchase money, with interest; that an account be taken of the rents and profits received by the plaintiffs in respect of the premises, or which, but for their wilful neglect and default, might have been received; and an inquiry as to any deterioration in the premises from the date from which the interest on the purchase money was to be computed, and as to what would be required to restore them; and it was declared

I am not willing to pay the purchase money;' or if he had said: 'I will not take possession unless you give a conveyance and the whole thing is closed up,' Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one, which, in the exercise of his strict rights, he would have himself created.

"But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the conveyance or in the parcels, each party being minded that the contract should go on, it is not true that giving possession to the vendee would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase money before completion is not according to

the ordinary course of proceeding, although sometimes the money is paid into court. Here there was a very small question between the parties as to this land occupied by the railway — a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel them to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession, pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated that on the payment of a small sum of money, £250, he might, and would have been let into possession. But there was some misunderstanding as to the payment, and the delay unfortunately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot perceive that anything which afterwards took place changed the relative position of the parties."

that the defendant would be entitled to set off against the interest the amounts so found. Where there is a rescission of a land contract, the parties are to be put in *statu quo* as nearly as possible. There cannot be a literal restoration where the contract has been acted upon, payments made, or possession enjoyed; then rescission requires compensation for what has been mutually enjoyed under the contract, as well as for deteriorations.¹ If the contract be rescinded in equity, even on the ground of fraud in the purchase, the court will, in general, direct an allowance to be made to the purchaser for beneficial expenditures; for substantial improvements and repairs.² This allowance, however, when the sale is set aside at the suit of the purchaser, will not extend to improvements, or even repairs — except such as are essential to the preservation of the property, where they are made subsequently to the discovery of the matter on which he grounds his right to relief.³ Such expenditures as are made before discovery of the defect in the title will be allowed, upon proper pleading, to the vendee;⁴ but subject to the counter-claim of rents and profits received, or which, without his wilful default, might have been received; and this is especially so where the improvements or expenditures have been made in pursuance of the contract.⁵

Where vendees have made expenditures upon the premises, not only in good faith and relying upon the performance of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement, the vendor, who is unable to perform the contract by giving a good title, cannot recover the possession of the lands without repaying these expenditures to the vendees. If a vendor is unable to make a good title to a portion of the premises, the vendees are entitled to elect whether they will rescind the contract *in toto*, and receive back their expenditures under it, or will receive such conveyance of the whole property as the vendor can give,

¹ Foster v. Gressett's Heirs, 29 Ala. 393; Smith v. Stewart, 83 N. C. 406; West v. Waddill, 33 Ark. 575.

² Dart on V. & P. 222; McClure v. Lewis, 72 Mo. 314. See Jackson v. Ludelling, 99 U. S. 513.

³ Id.

⁴ Id. 380; Patrick v. Roach, 21 Tex. 251.

⁵ Davis v. Strobridge, 44 Mich. 157; Gibert v. Peteler, 38 Barb. 488; S. C. 38 N. Y. 165.

paying him the price stipulated, less such deduction as may be just, for the defect. If, in such a case, the vendees elect to rescind the agreement *in toto*, they are entitled to be repaid the amount which they have expended in compliance with its terms, in permanent improvements; and that sum will be made a lien upon the premises, or its payment a condition to the surrender of the possession, or the recovery thereof by the legal owners. But if the vendees elect to receive such title as the vendors can give, with compensation for the defect, they have a right to ask for a judgment to that effect. The vendor cannot recover the possession of the premises, until the vendees have had an opportunity to make their election, and have it complied with, either by the repayment to them of the expenditures, or by the payment of the sum which shall be fixed as the proper purchase money, and a tender of a conveyance of the vendor's title. Purchasers will not be compelled to take part only of what they have agreed to buy as an entirety. The compensation for the deficiency in cases where a performance is decreed in part, consists in an abatement from the price for the diminution in value of the whole property in consequence of defects or incumbrances, and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all, with a conveyance of the residue only.¹ If the vendee has had possession under the contract, and afterwards procures a rescission on the ground of the vendor's failure to convey, the vendee is entitled to have the purchase money refunded; and he is entitled to interest upon it during the time that he is liable to another party as owner of the paramount title for rents and profits;² but not while in receipt of the rents and profits in the absence of such liability, unless they are of less value than the interest.³ And where the payment was made in depreciated currency, or in property, the refunding on rescission is to be according to its value.⁴

In Tennessee, the vendee, when he procures rescission on the ground that the vendor cannot make title, is entitled to recover

¹ *Id.* See *King v. Thompson*, 9 Pet. 204.

² *Talbot v. Sebree's Heirs*, 1 Dana, 56; *Oakes v. Buckley*, 49 Wis. 592.

³ See cases cited in note 1, ante, p. 233.

⁴ *Bodley v. McChord*, 4 J. J. Marsh. 477.

interest on purchase money recovered back, from the time when it was paid, as well as for valuable improvements.¹ He will not be allowed for improvements, taxes and other beneficial expenditures, except as a set-off against rents and profits, where only nominal damages for loss of the bargain would be given at law, unless there is fraud in the sale;² and he will be charge-

¹ Winters v. Elliott, 1 Lea, 676.

² Conger v. Weaver, 20 N. Y. 140; Peters v. McKean, 4 Denio, 550; Caffman v. Hack, 19 Mo. 435; Gibert v. Peteler, 38 N. Y. 170; Hoover v. Calhoun, 16 Gratt. 109; Bright v. Boyd, 1 Story, 478; McMalkin v. Bates, 46 How. Pr. 405; Lemmon v. Brown, 4 Bibb, 308; Jones' Heirs v. Perry, 10 Yerg. 59; McKinley v. Holiday, id. 477; Wilhelm v. Fimple, 31 Iowa, 131; Gillet v. Maynard, 5 John. 85; Morris v. Terrell, 2 Rand. 6; Putnam v. Ritchie, 6 Paige, 390. Where the owner of leasehold premises under a lease in fee, died, leaving several infant children, and their mother, who was the administratrix of his estate, assigned the lease to the owner of the rent, as heir of the lessor, in consideration of his discharging his claim for the rent against the estate of the decedent: Held, that the assignment was void, and that the children of the decedent were not divested of their legal estate in the premises; and that the assignee of the lease having, under a misapprehension of his legal rights in the premises, made large and valuable improvements thereon, the owners of the legal estate were not bound to pay him for their improvements.

The chancellor: "The arrangement for giving up the lease being wholly unauthorized, the defendants (claiming under that lease) are therefore entitled to the benefit of the natural increase in the value of the property since that time. I am not

aware that the law of any civilized country has directly deprived the legal owner of property of the natural accession to the same; although the supreme court of the United States, in the case of Green v. Biddle (8 Wheat. 1), appear to have supposed that the occupying claimants' law of Kentucky was calculated to produce that effect indirectly. But the rule of natural equity appears to be different in regard to industrial accessions or permanent improvements made upon the property of another by a *bona fide* purchaser. By the rules of the civil law, the possessor of the property of another, who had erected buildings or made other improvements thereon in good faith, supposing himself to be the owner, was entitled to payment for such improvements, after deducting from the value thereof a fair compensation for the rents or use of the property during the time he occupied it. Puff. B. 4, ch. 6, § 6; Code Napol. art. 555; 3 Partida. tit. 28; Bell's Law of Scotland, 130, art. 538; Rutherford Inst. 71; Inst. of Law of Spain, 102. This principle of natural equity has been adopted by the law of England and of this state to a limited extent, in the action for mesne profits, where the *bona fide* possessor of property is permitted to offset or recoup in damages, the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy. Here the use of the lot,

able for any waste and deteriorations which occur by his acts or negligence.¹ But when the circumstances are such that the vendee would be entitled to recover for loss of the bargain at law, he is entitled, on rescission, in equity, or where damages are given in lieu of specific performance, not only to recover back the purchase money and interest, but to be fully compensated for improvements and beneficial expenditures, with proper deductions for rents and profits which he has enjoyed.²

subject to the widow's right of dower, which the complainant is equitably entitled to under her assignment of the lease, although it could not be sold so as to pass the legal title before it was set off to her, is probably equal to two-thirds of the rent reserved upon the lease. And if I felt myself authorized to introduce this principle of natural equity into the law of this court farther than it has been adopted here, I should direct a reference to a master, to ascertain the present value of the lot, exclusive of the buildings, subject to the widow's dower and to the future exclusive of her share thereof, and also to ascertain the present value of the buildings, subject to the right of dower therein; and should give the defendants the right to elect, upon the coming in of the master's report, whether they would retain the legal title to the lot, subject to the rent and right of dower, and pay to the complainant the value of such improvements, or would release to him their legal estate in the premises, upon being paid the value thereof, as thus ascertained, exclusive of the buildings. This principle of natural equity is constantly acted upon in this court, where the legal title is in the person who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for

relief. The court, in such cases, acts upon the principle that the party who comes here as a complainant, to ask equity, must himself be willing to do what is equitable. I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land the legal title to which was in the defendant, where there was neither fraud or acquiescence on the part of the latter, after he had a knowledge of his legal rights." See *Bright v. Boyd*, 1 Story, 478; *Herring v. Pollard*, 4 Humph. 362; *Green v. Biddle*, 8 Wheat. 79.

¹ *Cornish v. Stratton*, 8 B. Mon. 586; *Foster v. Gressett's Heirs*, 29 Ala. 393.

² *Peabody v. Tarbell*, 2 Cush. 226; *Case v. Wolcott*, 33 Ind. 5; *Carroll v. Rice*, Walk. Ch. 373; *Putnam v. Ritchie*, 6 Paige, 390; *McConnell's Heirs v. Dunlap's Devises*, Hardin, 41; *Fisher's Heirs v. Kay*, 2 Bibb, 434; *Gerault v. Anderson*, 2 Bibb, 543; *Patrick v. Marshall*, id. 40; *Thompson v. Bell*, 37 Ala. 438. In this case, there was misrepresentation of quantity in a particular parcel included in the purchase; and it was held that the proper mode of computing damages is to multiply the average value (not of the entire tract, but) of the particular parcel

DAMAGES IN SUITS FOR SPECIFIC PERFORMANCE.—In suits for specific performance, equity may retain the case to give compensation in lieu of specific performance; specific performance may be decreed in part, and compensation allowed for the residue.¹ Where the entire relief which can be afforded in a suit of that character is compensation, courts of equity have sometimes granted it;² and the measure of that compensation is the same as that given at law.³ If there is a defect or an excess of quantity there will be an abatement or increase of the purchase money according to the average price per acre of the whole tract;⁴ and this defense of deficiency is generally good at law by way of recoupment;⁵ but for loss of a distinct parcel, there will be an abatement of the purchase price of that parcel, or of its actual value, according to the circumstances;

per acre, by the difference between the number of acres which it actually contained and the number which it was represented to contain.

¹ *Union Coal M. Co. v. McAdam*, 38 Iowa, 663; *Leach v. Forney*, 21 id. 271; *Presser v. Hildebrand*, 23 id. 483; *Hazelrig v. Hutson*, 18 Ind. 481; *Case v. Walcott*, 33 id. 5. Compare *Sternberger v. McGovern*, 15 Abb. N. S. 257; and see *Reynolds v. Johnson*, 13 Tex. 214; *Longworthy v. Mitchell*, 26 Ohio St. 334.

² *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 Cush. 130; *Pratt v. Law*, 9 Cranch, 494; *Payne v. Graves*, 5 Leigh, 561; *Morse v. Elmendorf*, 11 Paige, 277; *Ferrier v. Buzich*, 2 Iowa, 136; *Sternberger v. McGovern*, 15 Abb. N. S. 257; *Johnston v. Glancy*, 4 Blackf. 94; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Phillips v. Thompson*, 1 John. Ch. 131; *Adaz v. Echols*, 18 Ala. 353; 2 Story's Eq. § 798; *Carroll v. Rice*, Walk. Ch. 373; *Berryman v. Hewitt*, 6 J. J. Marsh. 462.

³ *Peabody v. Tarbell*, 2 Cush. 226; *Carroll v. Rice*, Walk. Ch. 373; *Dustin v. Newcomer*, 8 Ohio, 49; *Taylor v. Smith*, 2 Whart. 432; *Lee v. Dean*,

3 id. 316; *Coe v. Lindley*, 32 Iowa, 437; *Smith v. Sellyman*, 3 Whart. 589; *Gerault v. Anderson*, 2 Bibb, 543; *Patrick v. Marshall*, 2 Bibb, 40; *McConnell v. Dunlap*, Hardin, 41; *Fisher v. Kay*, 2 Bibb, 434.

⁴ *Wright v. Young*, 6 Wis. 127.

⁵ *Walsh v. Hale*, 25 Gratt. 314; *Nelson v. Carrington*, 4 Munf. 332; *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 Bay, 11; *Sumter v. Welch*, id. 558; *Adams v. Wylie*, 1 Nott. & McC. 78; *Hoback v. Kilgore*, 26 Gratt. 442; *Quernell v. Woodlief*, 6 Call, 218; *Hundley v. Lyons*, 5 Munf. 342; *Harrell v. Hill*, 19 Ark. 102; *Funk v. McKeoun*, 4 J. J. Marsh. 169; *Hemplin v. Eubank*, id. 634; *Burk's Appeal*, 75 Pa. St. 141; *Harder v. Woodward*, id. 479; *Kent v. Carcand*, 17 Md. 291; *Stow v. Bozeman*, 29 Ala. 401; *Rowland v. Shelton*, 25 Ala. 220; *Worthy v. Patterson*, 20 Ala. 172; *Whiteside v. Jennings*, 19 id. 784; *Marshall v. Wood*, 16 id. 812; *Willis v. Dudley*, 10 id. 938; *Joliffe v. Hite*, 1 Call, 262; *Hall v. Cunningham*, 1 Munf. 310; *Hall v. Mayhew*, 15 Md. 551. See *Courcier v. Graham*, 2 Ohio, 341.

that is, whether as to that parcel the damages for loss of the bargain should be substantial or only nominal.¹ Where a tract of land is sold for a sum *in gross*, and not by the acre; and the quantity stated is qualified by the words "more or less," there is no warranty of quantity, and there can be no abatement if the number of acres is less than that stated, nor compensation allowed for any excess.²

The English Chancery Amendment Act of 1858,³ commonly called Lord Cairn's Act, provides that in all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance. It has been held that under this statute the court would not interfere to award damages where it would not have interfered to grant relief before.⁴ It will not grant relief where the bill is filed for damages only;⁵ and this is the general doctrine of equity.⁶

In a case which was decided in England in 1874, a railway company agreed, for a valuable consideration, with a land-owner, to erect, construct and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to perform this stipulation,

¹Thompson v. Bell, 37 Ala. 438; Gibson v. Marquis, 29 id. 668; Walsh v. Hale, 25 Gratt. 314.

²Hall v. Mayhew, 15 Md. 551; Commissioners v. Thompson, 4 McCord, 241; Tucker v. Cocke, 2 Rand. 51; Chipman v. Briggs, 5 Cal. 76; Voorhees v. De Meyer, 2 Barb. 37; Harrell v. Hill, 19 Ark. 102; Ketchum v. Stout, 20 Ohio, 453; Tyson v. Hardesty, 29 Md. 305; Seamonds v. McGinnis, 3 Gratt. 319; Faure v. Martin, 3 Seld. 210; Mack v. Patchin, 29 How. Pr. 20; Jones v. Tatum, 19

Gratt. 735; Reed v. Patterson, 7 W. Va. 263. Compare Triplett v. Allen, 26 Gratt. 724.

³21 and 22 Vict. c. 27, sec. 2.

⁴Scott v. Rayment, L. R. 7 Eq. 112, 116.

⁵Middleton v. Magnay, 2 Hem. & M. 233; Betts v. Gallain, L. R. 10 Eq. 392.

⁶Richmond v. Dubuque, etc. Co. 33 Iowa, 422; Black v. Black, 15 Ga. 445; Lewis v. Yale, 4 Fla. 418; McQueen v. Chouteau, 20 Mo. 222; Wright v. Taylor, 9 Wend. 538.

and substituted a station at a distance of two miles, the land-owner instituted a suit for specific performance. The court, under the act which has been mentioned, held that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. The lord chancellor thus contrasted these modes of relief: "It has been a matter of some surprise to us that the plaintiff should have been dissatisfied with that conclusion; for if the view which has been already expressed is correct, supposing the court to have given him specific performance, it could not have extended the express obligation of the company, and, therefore, could only have given him the very minimum of that which is expressed in the terms creating the obligation; whereas, in the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity, against persons who are wrongdoers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that, in assessing damages, every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bona fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting, and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied, according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might with perfect propriety take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place on the line, to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability that if the company had *bona fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probab-

ity, that if the company had made the station, they would, in their own interest, have thought it worth while to make a reasonable use of it. All these are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this court when it discharges the functions of a jury."¹

There are cases in which a vendor may obtain specific performance, although in some particulars he is unable to fulfil the contract on his part. Thus, it was allowed, though the land, which was sold at auction, was described in the particulars preceding the sale as all within a ring fence, and the house in good repair, when they were otherwise.² But in such cases the court allows compensation for the defect, if the variation be such, and to the extent that it diminishes the value of the purchase.³ A purchaser is allowed more liberally than the vendor to have specific performance in part, and compensation for the rest, where the vendor is not able and cannot be compelled to completely execute the contract of sale.⁴ And in such cases the rule of abatement is the same.⁵

¹ *Wilson v. Northampton, etc. Ry.* Co. L. R. 9 Ch. App. 279.

² *Dyer v. Hargrave*, 10 Ves. 505. See *King v. Bardeau*, 6 John. Ch. 38; *Guyrot v. Mantel*, 4 Duer, 94; *Byer v. Marks*, 2 Sweeny, 715; *Reynolds v. Vance*, 4 Bibb, 213.

³ *Id.*; *Nagle v. Newton*, 22 Gratt. 814.

⁴ *Wood v. Griffith*, 1 Swanst. 54;

Dart on V. & P. 499, 500; *Mortlock v. Butler*, 10 Ves. 315; 1 Sugd. on V. 351; *Mustaw v. Gillespie*, 11 id. 640; *Seaman v. Vawdrey*, 16 id. 390; *Western v. Russell*, 3 V. & B. 187; *Ketchum v. Stout*, 20 Ohio, 453; *Painter v. Newby*, 11 Hare, 26.

⁵ *Dale v. Lester*, 16 Ves. 7, 11; *Lemmon v. Brown*, 4 Bibb, 308; *Clagett v. Easterday*, 42 Md. 617.

SECTION 3.

COVENANTS FOR TITLE—OF SEIZIN AND GOOD RIGHT TO CONVEY.

Purport of these covenants, and when broken—Damages for breach of these covenants—The actual consideration may be proved—Where the consideration does not measure the damages—Any recovery beyond nominal damages requires proof of actual loss—Where the covenant held to run with the land—How damages may be prevented or mitigated.

PURPORT OF THESE COVENANTS, AND WHEN BROKEN.—A purchaser under a general agreement to convey is entitled to a conveyance of a perfect title; to a deed properly framed to convey it, and containing the usual covenants.¹ The acceptance of a deed operates as a fulfilment of the agreement, whether such deed is strictly in conformity to the agreement or not, and the contract is thus merged in the deed.² Henceforth the purchaser must look to the covenants which the deed contains for his indemnity, if the title is defective or fails.³ The usual covenants are, first, of seizin and good right to convey; second, of warranty, and for quiet enjoyment; and third, against incumbrances.

The covenants of seizin and of good right to convey are not precisely alike, but they are practically so similar they are connected covenants, generally of the same import and effect, and directed to one and the same object.⁴ The former asserts an estate in the covenantor which may pass by his deed; the other is satisfied by the covenantor having even a naked power to convey. They are generally regarded as covenants for title, not merely for possession. A covenant that one is seized in fee is a covenant for title. And whenever the covenant is expressed, as it usually is in England, in formal and precise terms, as a covenant evincing an intention to assure the highest title, it has uniformly received a construction to require the title specified.⁵

¹ *Burwell v. Jackson*, 5 Seld. 535; *Doe v. Stanion*, 1 M. & W. 701; *Shreck v. Pierce*, 3 Iowa, 360; *Cullum v. Branch Bank*, 4 Ala. 21.

² *Howes v. Barker*, 3 John. 506; *Bull v. Willard*, 9 Barb. 641.

³ *Earle v. DeWitt*, 6 Allen, 520; *Jobe v. O'Brien*, 2 Humph. 34; *Maney v. Porter*, 3 id. 347.

⁴ *Howell v. Richards*, 11 East, 633.

⁵ *Prescott v. Freeman*, 4 Mass. 631; *Smith v. Strong*, 14 Pick. 128;

Wherever the grantor plainly covenants that he has an indefeasible estate in fee simple, or any other specified and clearly defined estate, any less estate will constitute a breach, or the covenant will be construed to bind the covenantor for the title specified. But there is great diversity in the forms of this covenant in the United States. It does not uniformly state, except as implied in the word *seized* or *seizin*, that the grantor has the highest title.

In Massachusetts and Maine, such an equivocal covenant is construed to mean only a *seizin* in fact or actual possession under color of title.¹ In the former state, the court held this language in an action upon these covenants: "The defendant, to maintain the issue on his part, was obliged to prove his *seizin* when the deed was executed. But it was not necessary to show *seizin* under an indefeasible title. A *seizin* in fact was sufficient, whether he gained it by his own *disseizin*, or whether he was in under a *disseizin*. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee simple, by a title adverse to the owner, he was seized in fee, and had a right to convey. If the defendant's grantor had no right to convey the premises to the defendant; yet, if in fact he entered under color, though not by virtue, of that deed, and acquired a *seizin* by *disseizin*, by ousting the former owner, he has not broken these covenants."² A similar doctrine has been advanced also in Nebraska and Illinois.³ In the latter state, however, the law is settled, by repeated adjudications, that the covenant of *seizin* is broken as soon as made if the grantor have not the covenanted title, and delivery of possession will not satisfy it.⁴

Raymond v. Raymond, 10 Cush. 134; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson, 4 id. 247; Abbott v. Allen, 14 John. 252; Collier v. Gamble, 10 Mo. 472.

¹Marston v. Hobbs, 2 Mass. 439; Raymond v. Raymond, 10 Cush. 134, 146; Twambley v. Honley, 4 Mass. 441.

²Slater v. Rawson, 1 Met. 450;

Hacker v. Storer, 8 Me. 228; Ballard v. Child, 34 id. 355.

³Scott v. Twiss, 4 Neb. 133; Watts v. Parker, 27 Ill. 224. But see Brady v. Spruck, id. 478; Furniss v. Williams, 11 id. 229.

⁴Baker v. Hunt, 40 Ill. 264; Brady v. Spruck, 27 id. 478; King v. Gilson, 32 id. 348; Frazer v. Supervisors, 74 id. 291; Tone v. Wilson, 81 id. 529.

When the covenants in express terms, or by construction, require the conveyance of a specified title, they have effect accordingly; and if the title of the grantor, or the title which he has power to convey, is less, to the whole or any part of the granted premises, the covenant is broken; in other words, the covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which his conveyance purports to convey.¹ Being covenants, *de presenti*, if broken at any time they are broken when made. And a suit at once may be brought, though the grantee goes into possession and has not been evicted.²

In England, and in some of the states, it is held that these covenants run with the land, if there is not a total breach at first. A distinction is made between a mere formal breach, from which no injury results, and a final and complete breach, by which the possession of the land is lost, or other actual injury ensues. It is held that where the covenantor is in possession claiming title, and delivers possession to the covenantee, the covenant of seizin is not a mere present en-

¹Howell v. Richards, 11 East, 633; Gray v. Briscoe, Noy, 142; Guthrie v. Pugsley, 12 John. 126; Kingdon v. Nottle, 4 M. & S. 53; Smith v. Strong, 14 Pick. 128; Park v. Cheek, 4 Cold. 20; Kincaid v. Brittain, 5 Sneed, 119; Gilbert v. Bulkley, 5 Conn. 262; Hall v. Gale, 20 Wis. 292; Parker v. Brown, 15 N. H. 176; Pickering v. Staples, 5 S. & R. 107; Mott v. Palmer, 1 Comst. 573.

²Morrison v. Underwood, 20 N. H. 369; Triplett v. Gill, 7 J. J. Marsh. 438; Spencer's Case in 1 Smith's Lead. Ca. pt. 1, p. *179; Smith v. Jefts, 44 N. H. 482; Bartholomew v. Candee, 14 Pick. 167; Lawless v. Collier, 19 Mo. 480; Pringle v. Witten's Ex'r, 1 Bay, 256; Abbot v. Allen, 14 John. 252; Brady v. Spruck, 27 Ill. 478; McCarty v. Leggitt, 3 Hill, 134; Mott v. Palmer, 1 Comst. 573; Pollard v. Dwight, 4 Cranch, 421; Chapman v. Holmes, 10 N. J.

L. 24; Fowler v. Poling, 2 Barb. 300; Garrison v. Sandford, 12 N. J. L. 261; Fitzhugh v. Crogan, 2 J. J. Marsh. 429; Lawrence v. Montgomery, 37 Cal. 183, 188; Murphy v. Price, 48 Mo. 247; Mitchell v. Warner, 5 Conn. 497; Dale v. Shively, 8 Kan. 276; Innes v. Agnew, 1 Ohio, 179; Kennison v. Taylor, 18 N. H. 220; Morrison v. Underwood, 20 id. 369; Parker v. Brown, 15 id. 176; Bickford v. Page, 2 Mass. 455; Gilbert v. Bulkley, 5 Conn. 262; Clark v. Swift, 3 Met. 390; Logan v. Moulder, 1 Ark. 313; Ingram v. Morgan, 4 Humph. 66; Craig v. Donovan, 63 Ind. 513. It was held in this case that a deed executed in Indiana of lands in another state should be governed by the laws of the latter as to the conveyance; but the covenant of seizin should be expounded by the laws of Indiana, and if false was broken immediately.

gagement, made for the sole benefit of the covenantee, but is a covenant of indemnity, entered into in respect to the land conveyed, and intended for the security of all subsequent grantees, when the covenant is finally and completely broken; and consequently, on such nominal breach when the covenant is made, no such right of action accrues to the covenantee as is sufficient to arrest the covenant, or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when the eviction takes place, or other real injury is sustained. The possession of the land, or seizin in fact, under the deed, by the covenantee and those claiming through him, is considered such an estate as carries the covenant along with it.¹

In Ohio the covenant of seizin is held to be one for title; that it runs with the land, where the grantor has an actual seizin; but that it is broken in such a case only when there has been an actual disturbance of the purchaser, or some one claiming under him; or, in other words, until actual injury is sustained, there is not even a nominal breach. If, however, there is no actual seizin and nothing passes by the deed, the covenant is broken immediately.²

The general doctrine held in this country, however, is that these are personal covenants: and if broken at all are so at the moment they are made, and are thereby turned into mere rights of action incapable of assignment, or of being sued upon at law by any but the covenantee and his personal representatives.³

¹Rawle on Cov. T. 325, and note; 4 Kent's Com. 472; *Kingdon v. Nottle*, 4 M. & S. 53; *Schofield v. Iowa Homestead Co.* 32 Iowa, 317; *Martin v. Baker*, 5 Blackf. 232; *McCrahey's Ex'r v. Brisbane*, 1 Nott. & McC. 104; *Mecklem v. Blake*, 22 Wis. 495; *Eaton v. Lyman*, 30 Wis. 41; *Graham v. Baker*, 10 C. P. 426; *Scriver v. Meyers*, 9 id. 255; *Banon v. Frank*, 14 id. 295.

²Adm'r of *Backus v. McCoy*, 3 Ohio, 211; *Foote v. Burnett*, 10 id. 334; *Devore v. Sunderland*, 17 id. 60; *Stambaugh v. Smith*, 23 Ohio St.

584, 588; *Great Western Stock Co. v. Saas*, 24 id. 542.

³Rawle on Cov. T. 319, 320; *Greenby v. Wilcocks*, 2 John. 1; *Hacker v. Storer*, 8 Me. 228; *Heath v. Whidden*, 24 id. 383; *Smith v. Jefts*, 44 N. H. 482; *McCarty v. Leggett*, 3 Hill, 134; *Thayer v. Clemence*, 22 Pick. 490; *Slater v. Rawson*, 1 Met. 450; *Fitzhugh v. Crogan*, 2 J. J. Marsh. 429; *Mitchell v. Warner*, 5 Conn. 497; *Clark v. Swift*, 3 Met. 390; *Davis v. Lyman*, 6 Conn. 249; *Bickford v. Page*, 2 Mass. 455; *Marston v. Hobbs*, 2 Mass. 439;

DAMAGES FOR BREACH OF THESE COVENANTS.—For a total breach of the covenant of seizin or good right to convey, where nothing passes by the conveyance, the measure of damages is the amount of the consideration paid and interest.¹ And the same rule applies where there is a breach as to quantity of land.² This measure of damages is not affected by the fact that intermediate the conveyance and the discovery that the title is defective, the value of land has been largely enhanced by improvements or other cause. A recovery of the value, as estimated by the parties at the time of the purchase, is precisely in accord with the standard of redress afforded by the ancient writ of *warrantia chartæ*; and this standard is now maintained as politic and just. In an early New York case,³ Kent, C. J., said: "Upon the sale of lands, the purchaser usually examines the title for himself, and in case of good faith between the parties

Williams v. Wetherbee, 1 Aik. (Vt.) 233; Garfield v. Williams, 2 Vt. 327; Pierce v. Johnson, 4 id. 247; Richardson v. Dorr, 5 id. 9; Potter v. Taylor, 6 id. 676; Hamilton v. Wilson, 4 John. 72; Bartholomew v. Candee, 14 Pick. 167; Lot v. Thomas, 2 N. J. L. 297; Carter v. Ex'r of Denman, 23 N. J. L. 260.

¹ Bickford v. Page, 2 Mass. 455; Sumner v. Williams, 8 id. 162; Le-land v. Stone, 10 id. 459; Ela v. Card, 2 N. H. 175; Morse v. Shattuck, 4 id. 229; Marsten v. Hobbs, 2 Mass. 433; Caswell v. Wendell, 4 id. 108; Smith v. Strong, 14 Pick. 128; Stubbs v. Page, 2 Greenlf. 378; Wilson v. Forbes, 2 Dev. L. 30; Willson v. Willson, 25 N. H. 229; Nutting v. Herbert, 35 id. 120; Mitchell v. Hazen, 4 Conn. 495; Sterling v. Peet, 14 id. 245; Henning v. Withers, 3 Brev. 458; Tapley v. Lebaume, 1 Mo. 550; Martin v. Long, 3 id. 391; Lawless v. Collier, 19 id. 480; Fraser v. Supervisors, 74 Ill. 291; Cummins v. Kennedy, 3 Litt. 118; Logan v. Moulder, 1 Ark. 313; Backus v. McCoy, 3 Ohio, 211; Clark v. Parr, 14 id. 118; Kimball v. Bryant, 25 Minn.

496; Cox v. Strode, 2 Bibb, 277; Nichols v. Walter, 8 Mass. 243; Chapel v. Bull, 17 id. 213; Greenby v. Wilcocks, 2 John. 1; Hacker v. Storer, 8 Me. 238; Bonta v. Miller, 1 Litt. 250; Blackwell v. Justices, 2 Blackf. 143; Lacy v. Mornan, 37 Ind. 168; Sheets v. Andrews, 2 Blackf. 274; Overhuser v. McCallister, 10 Ind. 41; Kincaid v. Brittain, 5 Sneed, 119; Recoys v. Younglove, 8 Baxter, 385; Park v. Cheek, 4 Cold. 20; Hacker v. Blake, 17 Ind. 97; Smith v. Strong, 14 Pick. 128; Hodges v. Thayer, 110 Mass. 286; Farmers' Bank v. Glenn, 68 N. C. 35; Foster v. Thompson, 41 N. H. 373; Brandt v. Foster, 5 Iowa, 287; Blossom v. Kuox, 3 Pin. (Wis.) 262; Blake v. Burnham, 29 Vt. 437; Phipps v. Tarpley, 31 Miss. 433; Campbell v. Johnston, 4 Dana, 182; St. Louis v. Bessell, 46 Mo. 157.

² Nelson v. Matthews, 2 Hen. & Munf. 164; Bond v. Quattlebaum, 1 McCord, 584; Morris v. Owens, 3 Strobb. 199; Blessing v. Beatty, 1 Rob. (Va.) 287. See Cornell v. Jackson, 3 Cush. 506.

³ Staats v. Ten Eyck's Ex'r, 3 Cai. 111.

(and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error; and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin." And again he says: "To find a proper rule of damages, in a case like this, is a work of some difficulty. No one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who for the sake of one hundred pounds would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee. The safest general rule in all actions on contract is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages when no fraud has been practiced, Justinian directed that the thing which was the object of contract should never be valued at more than double its cost. This rule a writer on the civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place;

but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum on which he may reasonably have calculated, being founded in natural law and equity, ought, in his opinion, to be followed, and care taken that damages in the case be not excessive. Rather than adhere to the rule of Justinian, or to leave the matter to the opinion of a jury, as to what may or may not be excessive, some more certain standard should be fixed on. However inadequate the return of the purchase money must be in many cases, it is the safest measure that can be followed as a general rule.”¹

¹ *Pitcher v. Livingston*, 4 Johns. 1; *Bender v. Fomberger*, 4 Dall. 436; *Rawle on Cov. T.* (4th ed.) 238.

Mr. Rawle, in his excellent work on *Covenants for Title*, says: “In certain parts of the United States, unimproved land is frequently conveyed to a purchaser in fee reserving to the vendor, as the entire consideration, an annual fee farm or ground rent, which represents the value of the land; the purchaser covenanting that he will, for the purpose of securing to the vendor the rent so reserved, erect certain stipulated improvements. In this class of cases, the improvements being directly within the meaning of the parties, and one of the inducements to the contract, it would seem that if the land thus improved were subsequently lost by reason of a defect of title or incumbrance created by the vendor, the damages should not be limited by the consideration, but might with propriety be increased by the value of the improvements thus made; and if there could be any doubt as to the liability of the vendor to this extent in case the defect or incumbrance were not

created by himself, although within the covenants he might have given, there would seem to be none where the loss was the consequence of his own act.” *Rawle on Cov. T.* (4th ed.) 256. In a note, this author says: “There is no direct authority for this suggestion; but since it was made in the last edition of this treatise, the following has been said by a late English writer: ‘I conceive that the doctrine laid down by Kent, C. J., in *Staats v. Ten Eyck*, 3 Cal. (N. Y.) 111, is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway, or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value; still, he would only be repaying money which he had actually received, and would on the same principle have a right to call on his vendor to return the sum which he had received, and

Where, for some purpose of the vendor, the purchaser, as part of the consideration of the sale, undertakes to make improvements upon the purchased property, it would be manifestly just, and in accord with general principles, that, in case of a subsequent loss of the property by reason of a defect of title, the value of such improvements should be included in the assessment of damages, not only in an action for breach of these covenants, but any others which might be broken by such deprivation.¹

ACTUAL CONSIDERATION MAY BE PROVED.—What the consideration of the sale is, as a basis of recovery for breach of these covenants, as well as of all the others, is open to proof as a fact *in pais*; and the statement of a consideration in the deed is only *prima facie* evidence of the amount. That statement does not preclude other proof, or even parol evidence, of the actual consideration, although it may establish a different one, in kind or amount, from that mentioned in the deed.² It may

no more. But the same obvious equity seems by no means to exist when the additional value arises on the outlay of the plaintiff's own capital upon the land. No doubt cases might be put in which a claim of damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over, and choose to reclaim the one, or build a mansion with pleasure grounds upon the other. But suppose he purchased building ground, at so much per foot, in London or Manchester, for the express object of building; ought he not to be repaid for money laid out in this way, the benefit of which is seized by a stranger? In this case the damage incurred is the direct result of the breach of contract, and a result which must have been contemplated by the party entering into the covenant. Probably this will be found to be the true ground of distinction, and that

every case must be decided upon its own merits, according as the improvements were the fair consequence of the contract of sale or not.' Mayne on Damages (2d ed.), 147. See also Dart on Vendors (4th ed.), 726."

¹ Id.

² Morse v. Shattuck, 4 N. H. 229; Barnes v. Learned, 5 id. 264; Nutting v. Herbert, 35 id. 120; S. C. 37 id. 346; Bingham v. Weiderwax, 1 Comst. 509, 514; Belden v. Seymour, 8 Conn. 304; Swafford v. Whipple, 3 G. Greene, 261; Hallum v. Todhunter, 24 Iowa, 166; Williamsen v. Test, id. 138; Byrnes v. Rich, 5 Gray, 518; Harlow v. Thomas, 15 Pick. 66; Hodges v. Thayer, 110 Mass. 286; Goodspeed v. Fuller, 46 Me. 141; Cushing v. Rice, id. 303; Martin v. Gordon, 24 Ga. 533; Moore v. McKie, 5 Sm. & M. 238; Gainette v. Chouteau, 34 Mo. 154; Rawle on Cov. T. (4th ed.) 258; Gavin v. Bucklers, 41 Ind. 528; Henderson v.

Henderson, 13 Mo. 151; *Bircher v. Watkins*, id. 521; *Pecare v. Chouteau*, id. 527; *Engleman v. Craig*, 2 Bush, 424.

In *Yetton v. Hawkins*, 2 J. J. Marsh. 1, relief in equity was granted on grounds which imply that such evidence is inadmissible at law. A bill was filed for relief against an excessive judgment for damages on a covenant of warranty. The judgment had been taken for the amount of the consideration stated in the deed, 86*l.* alleged in the bill to be penalty, and inserted in the deed through mistake, 43*l.* being the actual consideration. The relief was granted, enjoining the collection of one-half of the judgment. The court thus explains: "The chancellor had power to relieve against the mistake. Hawkins could not have resisted a judgment at law for the amount of consideration mentioned in the deed; because he would not have been able to prove the mistake; therefore, he could make no defense on the ground at law; and, consequently, as he has clearly established the mistake, it was the duty of the chancellor to grant him relief, to the extent of the mistake. If he could have proved the mistake on the trial at law, still, as he did not defend the suit, and rely on that ground, the chancellor will relieve him, as readily as if there had been a fraud." See *Trumbo v. Cartright*, 1 A. K. Marsh. 582; *Burke v. Beveredge*, 15 Minn. 205; *Steel v. Worthington*, 1 Ohio, 350; *Maigley v. Hauer*, 7 John. 341; *Jackson v. Delancy*, 4 Cow. 427.

In *Mayne on Damages* (2d ed.), 148, the author says: "Where the damages are calculated upon the basis of the purchase money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence. Where any con-

sideration is mentioned, if it is not said also, 'and for other considerations,' you cannot enter into any proof of any other; the reason is, it would be contrary to the deed; for when the deed says it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other." He cites *Lord Hardwicke in Peacock v. Monk*, 1 Ves. Sr. 128; *Rountree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704. But, as Mr. Rawle correctly remarks, "none of these cases (nor *Lampon v. Cerke*, 5 B. & Ald. 606) directly support the proposition." Rawle on Cov. T. (4th ed.) 258, note 1. This author says: "On this side of the Atlantic it may be considered as settled, that although (apart from the question of fraud) evidence to contradict or vary the consideration clause is inadmissible to defeat the conveyance as such; as for example by showing it void for want of consideration, as in *Wilt v. Franklin*, 1 Bin. 502; *Farrington v. Barr*, 36 N. H. 89; *Hurn v. Soper*, 6 Har. & J. 76; *Betts v. Union Bank*, 1 Har. & G. 175; *Claggett v. Hall*, 9 Gill & J. (Md.) 91; *Cole v. Albers*, 1 Gill, 423; *Elysville Man. Co. v. Okisko Co.* 1 Md. Ch. 392; *Henderson v. Henderson*, 13 Mo. 151, yet for any purpose short of affecting the title, this clause is not conclusive, but only prima facie evidence of the amount therein named. *Budard v. Briggs*, 7 Pick. 533; *Wade v. Merwin*, 11 id. 280; *Clapp v. Tirrell*, 20 id. 247; *McCrea v. Purmort*, 16 Wend. 460; *Burbank v. Gould*, 15 Me. 118; *Meeker v. Meeker*, 16 Conn. 383; *Beach v. Packard*, 10 Vt. 96; *Bingham v. Weiderwax*, 1 Comst. 509; *Watson v. Blaine*, 12 S. & R. 131; *Botton v. Johns*, 5 Barr (Pa.), 145; *Higden v. Thomas*, 1 Harr. & Gill

be thus shown that one of several parcels included in the deed was inserted by mistake, and that nothing was paid for it;¹ that the consideration was property; and then its value, at the date of the conveyance, with interest, will be the measure of damages.² But if the parties at that time agreed upon its value as a consideration, that value, rather than the value which might be ascertained by evidence on the trial, will be adopted as the basis of recovery.³

(Md.), 139; *Wolfe v. Hauver*, 1 Gill (Md.), 84; *Duval v. Bibb*, 4 Hen. & M. (Va.) 113; *Harvey v. Alexander*, 1 Rand. (Va.) 219; *Wilson v. Shelton*, 9 Leigh (Va.), 343; *Carry v. Lyles*, 2 Hill (S. C.), 404; *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Park v. Cheek*, 2 Head (Tenn.), 451; *Garrett v. Stuart*, 1 McCord (S. C.), 514; *Gulley v. Grubbs*, 1 J. J. Marsh. (Ky.) 388; *Hartley v. McAnalty*, 4 Yeates (Pa.), 95; *Heyden v. Mentzer*, 10 S. & R. (Pa.) 329; *Dexter v. Manley*, 4 Cush. (Mass.) 26; *Jack v. Dougherty*, 3 Watts (Pa.), 151, where the language of *Parker, C. J.*, in *Bullard v. Briggs*, is approvingly quoted; *Monahan v. Colgin*, 4 Watts (Pa.), 436; *Strawbridge v. Cartledge*, 7 W. & S. (Pa.) 399. In other words, the only effect of the consideration clause is to estop the grantor from alleging that the deed was executed without consideration; and that for every other purpose it is open to explanation, since the origin and purpose of the acknowledgment in a deed were merely to prevent a resulting trust to the grantor, the claim being merely formal and nominal, and not designed to fix conclusively the amount paid or to be paid. *Belden v. Seymour*, 8 Conn. 312."

In *Shorthill v. Ferguson*, 44 Iowa, 249, the defendant had sold land and conveyed it with covenants of warranty and of right to convey, and stated the consideration in the deed to be \$500, although in fact it was

much less. The grantee sold and conveyed to the plaintiffs. On a total breach, by which the plaintiffs were entitled to full damages, the question was raised whether the damages were limited to the real consideration received by the defendant from his grantee, or whether the plaintiffs were entitled to the amount of the consideration expressed in the deed. And the court say: "Parol proof of consideration to contradict that expressed in the deed is admissible between the original parties, but it is not admissible in a suit against the original grantor by one to whom his grantee has transferred the land. *Greenvault v. Davis*, 4 Hill, 643. We are of opinion, therefore, that the plaintiffs are entitled to recover, upon tender of conveyance to defendant, the sum of \$500, and interest thereon at six per cent. from the date of the deed. . . . The consideration in the defendant's deed is to be taken as a conclusive admission by defendant." *Hunt v. Orwig*, 17 B. Mon. 73; *Hanson v. Buckner*, 4 Dana, 251.

¹ *Leland v. Stone*, 10 Mass. 459; *Nutting v. Herbert*, 35 N. H. 121; S. C. 37 id. 346; *Barnes v. Learned*, 5 id. 264; *Stewart v. Hadley*, 55 Mo. 235.

² *Hodges v. Thayer*, 110 Mass. 286; *Bonnon's Est. v. Urton*, 3 G. Greene, 228; *Lacey v. Marnan*, 37 Ind. 168. See *Davis v. Hall*, 2 Bibb, 590.

³ *Williamson v. Test*, 24 Iowa, 138.

WHEN THE CONSIDERATION DOES NOT MEASURE DAMAGES.—In cases where this measure of damages cannot be applied, as where the consideration cannot be ascertained;¹ or where it is paid by a third person, on whose request the conveyance, with the covenants, is made;² so that the damages must be determined according to the circumstances of the particular case, the value of the land at the time of the intended conveyance, with interest from that date, will be the measure of damages.³

It does not matter that the consideration is, in fact, paid or delivered to another person than the grantor; or that it is itself, before delivery, the property of another than the grantee; provided that it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given. Their contract creates the privity between them in relation to the consideration, and constitutes it the price of the agreed conveyance. It thereby becomes the measure of the grantee's loss.⁴ Shaw, C. J.,⁵ said: "The rule of damages is perfectly well settled in this commonwealth; it is the amount of the consideration actually paid by the grantee to the grantor, with interest from the time of the payment. We say paid by the grantee to the grantor, which is the most common case. But there may be anomalous cases, especially where it is not a direct negotiation between the parties to the deed, but where, in a negotiation between two, there is a stipulation by one with the other, upon a certain consideration, to execute a deed, and convey certain land to a third person, and a deed is given accordingly." He stated the case under consideration, to which his observations applied: "The plaintiff agreed to receive of one L a certain lot of land in M in full satisfaction and discharge of a debt. L then agreed with the defendant to purchase of him the same land, and then requested the defendant to make the deed direct to the plaintiff with warranty; he executed it accordingly, upon a large nominal consideration expressed, and handed it to L, who delivered it to the plaintiff in satisfaction of his debt. Then what was the actual consid-

¹ Smith v. Strong, 14 Pick. 123.

² Byrnes v. Rich, 5 Gray, 518.

³ Id.

⁴ Hodges v. Thayer, 110 Mass. 286.

⁵ Byrnes v. Rich, *supra*.

eration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to the defendant by L; to that the plaintiff is a stranger. It seems, therefore, to be a case to which the ordinary general rule cannot apply, and which must be determined according to its particular circumstances upon the general principle applicable to breaches of contracts; the party shall recover a sum in damages, which will be a compensation for the loss. The case is very similar in principle, and considerably so in its facts, to that of *Smith v. Strong*.¹ It was there laid down that, in such case, the measure of damages is the consideration paid, with interest from the date of the deed; but if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance, with interest from the date of the deed, will be the measure of damages. It appears to us that this rule will afford indemnity in the present case. If the failure of title extended to the whole of the land, then the entire value of the land is the measure; if to part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part, the title to which failed, with interest, will be taken as the measure of damages.”²

EFFECT OF RECOVERY ON A TOTAL BREACH.—Where there is a breach of these covenants extending to the entire subject of the purchase, and the plaintiff has never got into possession, and, in consequence of the want of title, never can, the recovery of the purchase money and interest is clearly and uniformly held to be the proper measure of damages. The action on the covenant then comes in place of an action for money had and received, on failure of consideration.³ The action on the covenant does not, however, proceed as an action for money had and received does, upon the theory of rescission; though practically the result is the same.

¹ 14 Pick. 128.

³ *Baker v. Harris*, 9 A. & E. 532;

² See *Staples v. Dean*, 114 Mass. 125; *Mayne on Dam.* (2d ed.) 143.
Recols v. Younglove, 8 Baxter, 385.

The recovery of damages for such a breach is a bar to any further recovery;¹ and hence the covenant would have no validity afterwards. On a breach, its force is spent, and the covenantee has but a right of action.

Satisfaction of the judgment for damages may, moreover, well have the effect to preclude the assertion of any right under the conveyance. It would be manifestly unjust that a grantee should recover either the purchase money or the value of the land, against the grantor, upon an alleged breach of covenant that nothing passed by the deed, and yet that he should be considered the owner of the land, under the very deed which he had alleged to be inoperative.² When a warrantee in *warrantia chartæ* recovers and has a seizin of other lands of the warrantor to the value, he cannot afterwards recover of the warrantor the lands warranted. For although the warrantor cannot aver against his own deed, yet the warrantee may aver against that deed; and if his averments are verified by matter of record, the warrantor may afterwards avail himself of that record against the warrantee, the record being of a higher nature than a deed.³

ANY RECOVERY BEYOND NOMINAL DAMAGES REQUIRES PROOF OF ACTUAL LOSS.—Any recovery beyond nominal damages is dependent upon proof of actual loss, and is restricted to it.

In *Hartford and Salisbury Ore Co. v. Miller*,⁴ the court say: "The general rule is, in actions upon contracts, that the plaintiff shall recover the actual damages sustained. An action for breach of the covenant of seizin in a deed is not an exception to the rule. It is doubtless true that in such actions generally the actual damage sustained is in fact the consideration paid, and interest, because the party takes nothing by his deed. It is in its inception, and continues to be, a nullity. But if the party

¹Duchess of Kingston's Case, 2 Smith's L. Ca. (7th ed.) 778; Outram v. Moorwood, 3 East, 346; Donnell v. Thompson, 10 Me. 174; Nosler v. Hunt, 18 Iowa, 212; Markham v. Middleton, 2 Str. 1259; Rawle on Cov. T. (4th ed.) 265 and note.

²Stinson v. Sumner, 9 Mass. 143;

Parker v. Brown, 15 N. H. 176; Porter v. Hill, 9 Mass. 34; Blanchard v. Ellis, 1 Gray, 202; Kincaid v. Brittain, 5 Sneed, 119. See Johnson v. Simpson, 36 N. H. 96.

³Porter v. Hill, 9 Mass. 34; Foss v. Stickney, 5 Greenlf. 390.

⁴41 Conn. 112.

takes anything by his deed, directly or indirectly, by its own force, or by its co-operation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, its value must be considered in considering the damages." The whole consideration money and interest cannot be the criterion of damages, except in those cases where the purchaser derives no benefit from the conveyance. The consideration and interest is *prima facie* the damage resulting from the breach; but this may be varied by circumstances.¹

If the grantor is in actual possession, but without any title, in theory, at least, he can confer no benefit on his grantee by the ceremony of making a deed to him, and delivering possession. The deed would vest no title, and, the possession being wrongful, the purchaser would incur a liability to the true owner for his occupation. Such a transaction, at best, would only give the purchaser an opportunity, by continuous wrong, to acquire title by virtue of the statute of limitations.

In such a case, may not the purchaser, although in actual possession, elect to consider himself an actual loser in respect to the whole subject of the purchase? His actual possession is no objection, except as it affects the amount of damages; for as we have seen, eviction is not necessary to give him a cause of action. It is no defense that he is in the undisturbed possession of the premises.² If he so elects, and recovers full damages as upon a total breach, the grantor may resume possession, and the parties are in *statu quo*, except that the purchaser has had possession, with its practical benefits, and there is only a possibility of being made to pay damages for it to the true owner; but this possession is deemed but the equivalent of interest on the purchase money, and hence is to be considered only in that connection.³

In Missouri, where the covenant is held to run with the land, if the grantee has taken possession under his deed, he can recover only nominal damages until he has been compelled, by the assertion of the paramount title, to yield possession to the claimant. He has no right to abandon the possession, and claim substantial damages.⁴

¹ Kimball v. Bryant, 25 Minn. 496;
Cockrell v. Proctor, 65 Mo. 41.

² Akerly v. Vilas, 21 Wis. 109.

³ Recohs v. Younglove, 8 Baxter,
385, 387.

⁴ Cockrell v. Proctor, 65 Mo. 41.

Although there has been some hesitation with text writers to regard such a case as one for recovery of full damages, measured by the consideration money;¹ yet it is believed that in those jurisdictions, at least, where these covenants are not regarded as continuing and running with the land, the consideration money is generally accepted as the proper measure of damages, with interest, less any benefit the grantee has obtained from possession.² In *Parker v. Brown*,³ Parker, C. J., said: "No wrong is done by the maintenance of the action; for if the grantee recovers damages for the breach of the covenant of seizin, on the ground that the grantor had no title whatever, the operation of it must be to estop the grantee from setting up the deed afterwards, as a conveyance of the land, against the grantor. We see not why the grantor may not again enter, if he chooses, as against the grantee. A recovery in trespass or trover, with satisfaction, vests the property in the party against whom the damages were assessed. The defendants may re-enter if they think proper, and will hold under their former possession against all persons who cannot show a better right. We are not aware of anything in the nature of the feudal investiture, or in the principles which regulate the title to land at the present time,

¹ Dane's Abridgment, vol. IV, p. 340; Mayne on Damages (2d ed.), 143. This author says: "Where the plaintiff has never got into possession, and in consequence of the want of title never can, the above is clearly the proper measure of damages. . . . But it may be doubted whether the same rule would hold good as a matter of law, where the plaintiff had got into possession, and in fact continued so still. A case may be easily imagined, and indeed constantly occurs, in which there is such a defect in the title as makes it strictly unsalable, though there is little or no chance of the occupant ever being turned out. In such a case it would not be fair to allow the whole purchase money to be recovered. The vendor has not given a salable title as he engaged; but he

has given up his possessory title, which was worth something to him, and is worth something to the purchaser."

In the first edition of *Rawle on Covenants for Title* (p. 83), it was said: "If nothing had been paid, and no pecuniary loss had been suffered, and the possession had not been disturbed, it is believed that nominal damages only would in general be allowed. The technical rule, therefore, that the covenant of seizin is broken, if at all, at once and completely, is, as respects the damages, little more than a technical one." See post, note; *Collier v. Gamble*, 10 Mo. 472; *Mason v. Cooksey*, 51 Ind. 519.

² *Tone v. Wilson*, 81 Ill. 529; *Flint v. Steadman*, 36 Vt. 210.

³ 15 N. H. 176, 188.

that should require a different rule in relation to real estate. The record of the recovery will furnish as good an estoppel as that which arises from a disclaimer.¹ . . . The measure of damages for the breach of the covenant of seizin is the value of the land at the time of the conveyance, which may be determined by the consideration paid. This was stated to be the rule in this case, and it is not controverted that the consideration expressed in the deed was the evidence of value."²

Possession without title may compensate for the interest on the purchase money, if there be no liability, which will be enforced, to the real owner. But the question whether such owner will ever claim the land must remain an open question until he is precluded by lapse of time; and the mere fact that the purchaser presently obtains no title renders his conveyance nugatory — valueless, unless so much time of adverse possession has elapsed as to afford assurance of the continued silence and inaction of that owner. The purchaser derives no property or value in the land. It does not become his; he cannot safely improve it; his claim to it has no other value than such as attaches to it in view of the possible extinction of the superior right by non-claim. That the absence of title is an element of damage which may be the basis of recovery, although there is no disturbance of possession, and indeed can be none, is evident from those cases in which the grantor undertook to convey a fee, and covenanted accordingly, having only a less estate in

¹Hamilton v. Elliot, 4 N. H. 182.

²Park v. Cheek, 4 Cold. 20; Tone v. Wilson, 81 Ill. 529; Fraser v. Supervisors, 74 id. 282; Kincaid v. Britain, 5 Sneed, 119; Richard v. Bent, 59 Ill. 38; Lawless v. Collier, 19 Mo. 480; Harris v. Newell, 8 Mass. 262; Bickford v. Page, 2 id. 455; Mitchell v. Hazen, 4 Conn. 495; Horsford v. Wright, Kirby, 3; Castle v. Peirce, 2 Root, 294; Caulkins v. Harris, 9 John. 324. See Tarpley v. Poage, 2 Tex. 139; Copeland v. Gorman, 19 id. 253; Cooper v. Singleton, id. 260. In the 4th edition of Rawle on Covenants for Title in note 3, p. 281 (see ante, p. 259, note 1), the author

says: "Upon subsequent consideration, the opinion was formed that . . . (the passage quoted in the preceding note) did not correctly express the law, and it was omitted in the second edition. . . . It is believed . . . that if the breach of the covenant has occurred, affecting the whole title (for where it touches part only, *Morris v. Phelps*, 5 John. (N. Y.) 56, it is a distinct authority that the purchaser has no authority to rescind), the plaintiff has a right to recover damages measured by the consideration money." See *Hacker v. Blake*, 17 Ind. 97; *Cockrell v. Proctor*, 65 Mo. 41.

possession. In such cases the rule has been applied to merely deduct the value of the less estate conveyed from the amount which would be recoverable for a total breach;¹ or to allow to be recovered the difference between the covenanted and the conveyed estate.²

Where, however, there have been such forms of conveyance to the grantor that the defect of title is only a technical one, and there has been long possession under the conveyance, though not for the full period to quiet the title under the statute of limitations; if nothing has been paid or done to extinguish or acquire the paramount title, it is perhaps an unanswered question in the books, whether full damages could be recovered, in the absence of any actual assertion of that title. Would there not be wanting the element of actual loss, or immanence of actual loss which is essential to justify the assessment of damages on that basis? If the outstanding title has been bought in by the covenantee, and there was none in the covenantor, recovery might be had for the amount paid for it, to the limit recoverable for a total breach of these covenants.³

¹Tanner v. Livingston, 12 Wend. 83; Guthrie v. Pugsley, 12 John. 126; Lockwood v. Sturtevant, 6 Conn. 373; Terry v. Drabenstadt, 68 Pa. St. 400; Mills v. Catlin, 22 Vt. 98.

²Gray v. Briscoe, Noy, 142.

³Lawless v. Colliers, 19 Mo. 480, is an instructive case upon the point here suggested. The opinion contains a valuable summary of the law relating to damages for breach of the covenant of seizin, and it is applied to a novel state of facts. Scott, J.: "On the 29th day of September, 1831, George Collier, for the sum of \$800, conveyed to H. R. Gamble, in fee, sixteen and a fraction acres of land, with a covenant that he was seized of an indefeasible estate therein. On the 8th of November, 1834, Collier conveyed to Gamble twenty-four and ninety-one one-hundredths acres of land for the sum of \$1,868, with a like covenant

as in the first deed. These two tracts were contiguous and made one parcel; and on the 14th day of March, 1836, were conveyed by Gamble to Adam L. Mills, for the sum of \$12,000, by a deed containing the covenants expressed by the words 'grant, bargain and sell,' and a general warranty. Afterwards, doubts began to be entertained about the validity of the title of Collier to the land conveyed to Gamble, and by Gamble to Mills; and Gamble, on the 16th day of March, 1843, purchased from Luke E. Lawless, who claimed, under the heirs of Ames Stoddard, one undivided fifth of a tract of 350 arpens, which entirely covered the land conveyed by Collier to Gamble. In a conflict between the title of Collier and the heirs of Stoddard, the latter prevailed, Collier claiming under a New Madrid location, and Stod-

There is something incongruous in allowing, in any case, full damages as for actual loss, and yet requiring a reconveyance. This is so where no title whatever is conveyed; but, if some title passes, but so far short of the title covenanted for, that the

dard's heirs under a concession by the Spanish government, confirmed by the act of congress of July 4, 1836. The consideration of the conveyance from Lawless to Gamble was one thousand dollars and an assignment of the covenants contained in the deeds of Collier to Gamble, in trust for Virginia Lawless, the plaintiff, and wife of Luke E. Lawless. The title of Collier having been defeated by that of the heirs of Stoddard, Gamble, by means of the one-fifth part of the claim of the said heirs, which he had purchased from Lawless, was enabled to perfect the title to the land he had conveyed to Mills, and by suitable conveyances, between all interested, Mills and those to whom he had conveyed were made secure in the possession of the land they had purchased from Gamble. Neither Mills nor those claiming under him have been actually evicted, nor has Gamble been compelled to pay any damages, by reason of any covenants contained in his deed to Mills. On this state of facts, Virginia Lawless, the beneficiary assignee of Gamble, instituted an action for the breach of the covenants of seizin contained in the deed from Collier to Gamble, claiming damages to an amount equal to the purchase money received by Collier, with interest from the time of payment. The defendant maintained that the plaintiff was only entitled to nominal damages. The court directed the jury that the measure of damages was the sum paid by Gamble to Lawless for the interest he ac-

quired in the claim of Stoddard's heirs, together with interest. There was a verdict accordingly.

"1. As the title under which Collier held the land has been defeated, and as Mills and those claiming under him no longer hold by the title originally obtained from Collier, but by means of the purchase made by Gamble from Lawless of an interest in an adverse title, the rule which limits a recovery in an action on the covenant of seizin to a nominal sum until there has been an eviction, has no application, under the circumstances of this case. Where the title conveyed has been defeated, and the grantee or his assigns hold by an adverse title to that acquired from their grantor, there can be no necessity for submitting to the form of an eviction, in order to be entitled to a recovery of full damages for a breach of the covenant of seizin. The reason of the rule, as laid down in the case of *Collier v. Gamble*, 10 Mo. Rep. 472, shows that it is inapplicable to the circumstances of this case, as now presented. Rawle, speaking on this subject, says: 'Cases may, of course, occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet, when the failure of title is so complete, and the loss so morally certain to happen, that a court might feel authorized in directing the jury to assess the damages by the consideration money.' P. 83.

"2. The weight of American authority has determined that the cov-

grantee is clearly not bound to retain it for a proportional part of the purchase money, on tendering a reconveyance, and surrendering possession, recovery may be had of the entire consid-

erant for seizin is broken, if broken at all, so soon as it is made, and thereby the immediate right of action accrues to him who has received it. But in such case, the grantee is not entitled, as matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the sum paid. If he has been actually deprived of the whole subject of his bargain, or of a part of it, they are measured by the whole consideration money in the one case, and a corresponding part of it in the other. Rawle, 44.

"3. Under the peculiar circumstances of this case, what is the measure of damages? Can it be said that the purchase money paid by Gamble to Lawless is the just measure? Was it by the payment of the sum of \$1,000 only, that Gamble was enabled to secure the title or possession of his grantee, and thereby prevent a recourse against him on his covenant? Such an assertion is not warranted by the facts. We cannot say that Lawless, in making a sale of his land, did not regard the covenants of Collier as worth the full sum which they were given to secure. He did not convey to Gamble the identical land that Gamble had conveyed to Mills. His conveyance of itself did not operate but partially to secure Gamble, and thereby secure his recourse against Collier for his purchase money. It was by the acts of Gamble, subsequent to Lawless' conveyance, that his vendee's title was perfected. What right

had Gamble, then, to adopt a course of conduct which would have impaired the recourse of Lawless' trustee on the covenants which had been assigned to him for the benefit of Virginia Lawless? In so doing, he would have injured the plaintiff, and have destroyed a part of the consideration he had given to Lawless for his interest in the Stoddard claim. Would not Gamble then have been liable to Virginia Lawless for the destruction of the right which he had assigned for her benefit? This is the consequence flowing from holding that the \$1,000 paid by Gamble to Lawless should be the measure of damages in this action. This would be unjust to Gamble. It would be placing him in the attitude of a wrongdoer to the plaintiff, whilst performing an act dictated by considerations of justice to himself and to those to whom he was under obligations to indemnify. Is it not more just that Collier should refund the money he has received from Gamble, the consideration of which has entirely failed, than that Gamble should be placed in the condition of enriching himself at the expense of another? No one can say that without the assignment of the covenants in Collier's deeds, Gamble ever would have been enabled to obtain Lawless' interest in the Stoddard claim. We know not how these covenants were estimated. No rule is known by which their value can be reduced below the sums they were given to secure.

"4. It was maintained that before there could be a recovery of the entire consideration money received

eration and interest, together with taxes paid, less the value of rents received.¹ The grantor, in such cases, may elect to consider the title as wholly failing.² The want of reconveyance is no bar to the action, and a release by the covenantee to a third person is not, nor would it on principle affect the right of the covenantee to full damages, when no title passed,³ except where the covenant is held to run with the land.⁴ The doctrine laid down in *Bickford v. Page*,⁵ would seem opposed to any abatement of damages where there had been a sale for a consideration even exceeding the purchase money paid when the covenant was made. The action was on the covenant of good right to convey. The defendant pleaded that before the plaintiff commenced the action, before he had improved the premises, or added any value, he transferred them to T R for the consideration of one hundred dollars in fee, without covenants rendering the plaintiff answerable for any defect of title; averring that thereby all the plaintiff's right, title, and interest thereon, and in the covenants, passed to T R. On demurrer, this was held no bar. Parsons, C. J., said: "As the defendant in his bar has not traversed this breach (of the covenant of good right to convey), nor confessed and avoided it, we must consider this covenant as having been broken by him. It must therefore have been broken immediately on the execution of the deed containing it; and the damages accruing from the breach must have been suffered by the plaintiff before his release to T R. This covenant having been broken before the release, was at that time a mere *chose in action* not assignable. Neither could it have passed by the release; because no estate passing to the plaintiff by the defendant's deed, there was no land to which this covenant could be annexed so as to pass to the releasee." . . .

by Collier, there should be a reconveyance of the title derived from him. The want of such reconveyance is no bar to the action. This matter rests in the discretion of the court. Under the circumstances of this case, a court would impose no terms to prevent a recovery of the entire consideration money. A reconveyance here would be a nugatory act

and totally unavailing for any purpose. Rawle, 84."

¹ *Frazer v. Supervisors*, 74 Ill. 282.

² *Kincaid v. Brittain*, 5 Sneed, 119; *Recohs v. Younglove*, 8 Baxter, 385.

³ *Cornell v. Jackson*, 3 Cush. 506.

⁴ *Cockrell v. Proctor*, 65 Mo. 41; *Schofield v. Iowa Homestead Co.* 32 Iowa, 317.

⁵ 2 Mass. 455.

"But he (the plaintiff) is entitled to his damages for the breach of the defendant's covenant that he had a good right to convey. The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant; he has lost only the consideration which he paid for it, amounting to 6*s.* 5*d.* This he is entitled to recover back with interest to this time."

Whatever the covenantee realized as a benefit from the conveyance to him would diminish his actual loss. If the title is made good by the statute of limitations, and there has been no actual disturbance or injury, the damages would be merely nominal.¹ Though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the state of facts existing at the time when the assessment is made; and any facts occurring afterwards, even down to the actual assessment of the damages, tending to increase or diminish them, may be given in evidence, and considered by the jury.² At least nominal damages are allowed for any breach of these covenants when no actual injury is sustained. The law always infers some injury, and awards this minimum of damages for every violation of contract.³

WHERE THE COVENANT HELD TO RUN WITH THE LAND.—In *Eaton v. Lyman*⁴ there is a forcible protest against nominal damages for a mere technical breach of such covenants when they are held to run with the land, and are available to those claiming under the covenantee, in the dissenting opinion of Dixon, C. J. He says: "In those courts which hold that covenants of seizin and against incumbrances (for both stand upon the same footing and are regarded as of the same nature by all courts) are purely personal and *de presenti*; and so are complete and perfect, or broken and impaired, as soon as made, the doctrine of nominal breach and nominal recovery is very consistent and proper. Such doctrine necessarily results

¹ *Wilson v. Forbes*, 2 Dev. 30.

³ *Morrison v. Underwood*, 20 N.

² *Morrison v. Underwood*, 20 N. H. 369; *Miller v. Hartford & Salisbury Ore Co.* 41 Conn. 112, 130.

H. 369; ante, vol. 1, p. 9.

⁴ 30 Wis. 41.

from the nature of the covenants as held by them, the same being broken as soon as made, and so converted into mere choses in action or rights to sue, in the hands of the covenantee, and so deprived of all capacity to run with the land, so as to pass the benefit of them to the grantee of the covenantor. In those courts, the recovery is reduced to a merely nominal one where there was seizin in fact or in deed of the land in the covenantor, which passed to the covenantee, who has entered and enjoyed according to the deed; and where the breach complained of is merely a paramount title in a stranger, or an outstanding incumbrance that has not yet been either asserted or extinguished. And the reason why in such cases the damages are only nominal is, that if for such breach the covenantee is permitted to recover the consideration and interest, he may get both the purchase money and retain possession of the land under a title which is defeasible, but which in fact may never be defeated. The entire learning of those courts holding to the *de presenti* nature of the covenants is very concisely exhibited in the numberless citations made in *Morrison v. Underwood*.¹ . . . But this court having in . . . [*Mecklem v. Blake*],² . . . as well as others, adopted and declared the rule of interpretation that covenants of seizin and against incumbrances are real and *de futuro*, and not personal and *de presenti*, so that they run with the land and pass the benefits of them to the grantees of the covenantee, it follows as clearly and undeniably as one proposition can follow from another, that there can be no nominal breach, or nominal recovery, where the covenantee, or those holding under him, take and retain undisturbed possession of the land without molestation or loss from the paramount outstanding title or incumbrance. This follows necessarily and logically from the premises respecting the nature and operation of the covenants. They are thus placed upon the same footing as other covenants which inhere in and attach to the realty, and run with it until the breach ensues. They belong to the same category or class with the covenants for further assurance of quiet enjoyment and of warranty, which are dependent upon posterior events, and of which

¹ *Supra*.² 22 Wis. 495.

there can be no breach until such events happen. Such is the logical sequence of the doctrine we have adopted, and such it will be found are the decisions of those courts in which the same doctrine prevails." Nominal damages are denied in Ohio.¹

HOW DAMAGES MAY BE PREVENTED OR MITIGATED.—Between the execution of the deed when these covenants are supposed to be broken, and the assessment of damages, the defect of title, which constituted the breach of the covenant of seizin, may have been remedied by time or accident, by the acts of strangers, or by the acts of the grantor, without the interference in any way of the grantee or his assignee; as by the death of a tenant for life, the performance of a condition or the like, or by the release or purchase of opposing claims. The grantee, at the time damages are assessed, may, consequently, have the property and interest for which he contracted free of any defect, and this without trouble or expense to himself; and he would in such case, therefore, be equitably entitled to recover nothing more than nominal damages which are implied by law from every breach of covenant, and which give to the grantee a right of action, of which he will not be deprived without some act or neglect of his own.² If, after a breach of these covenants, and before action brought to recover damages, the covenantor acquires the paramount title, and, by virtue of other covenants in the deed, that title enures to the covenantee, this fact will go in mitigation of damages, and may reduce them to nominal.³ It is thus seen that for a total breach the measure of damages is the consideration and interest; and that for a mere technical breach, nominal damages only can be recovered. Between these extremes, damages may be recovered proportionate to the

¹ Backus v. McCoy, 3 Ohio, 211; Foote v. Burnett, 10 Ohio, 318; Devore v. Sunderland, 17 Ohio, 52. See Schofield v. Iowa Homestead Co. 32 Iowa, 317.

² Morrison v. Underwood, 20 N. H. 369.

³ Baxter v. Bradbury, 20 Me. 260; Knowles v. Kennedy, 82 Pa. St. 445; King v. Gilson, 32 Ill. 348; Burke v. Beveridge, 15 Minn. 205; Kimball v.

Bryant, 25 Minn. 496, 500; McCarty v. Leggett, 3 Hill, 134; Noonan v. Ilsley, 21 Wis. 138. See Blanchard v. Ellis, 1 Gray, 193; Burton v. Reids, 20 Ind. 87; Bingham v. Weiderwax, 1 Const. 509; Tucker v. Clark, 2 Sandf. Ch. 96; Boulter v. Hamilton, 15 U. C. C. P. 125; Doedwine v. Webster, 2 U. C. Q. B. 224; Cornell v. Jackson, 3 Cush. 506.

actual injury; this is the invariable criterion and measure.¹ Thus, where the covenant was of a seizin in fee, and the estate possessed and conveyed was copyhold, the covenant was broken, and the covenantee was held entitled to damages according to the difference in value between a fee simple and a copyhold estate.² So where a fee simple has been covenanted for and the title conveyed was subject to a life estate, the value of the latter is recoverable;³ and the value of this life estate may be computed from life tables.⁴

Where a deed of the entirety in fee was made with covenants of seizin, power to sell and of warranty, and the grantor owned only an undivided two-sixths and a life estate in the other four-sixths, the plaintiff was held entitled to recover damages in an action for breach of the former covenants only in proportion to the value of the part for which the title had failed; that is, four-sixths of the consideration money and interest; but, as the life estate of the defendants in the four-sixths passed to the plaintiff, by this deed, the value of such life estate must be deducted; nor was interest to be allowed during the life of the defendants, as, during that time, the plaintiff could not be called on for mesne profits.⁵ If A conveys land to B, with covenant of seizin, and the title to part only of the land fails, the sale will not be rescinded by a recovery at law so as to give the vendee a right of action to recover back the whole consideration money; but the plaintiff is only entitled to recover damages in proportion to the extent of the defect of title, or the value of the part lost. The measure of damages is the value of the part to which the title has failed, with reference to the value of the residue. In a New York case,⁶

¹ Herndon v. Harrison, 34 Miss. 486; Nutting v. Herbert, 37 N. H. 346; Miller v. The Hartford & Salisbury Ore Co. 41 Conn. 130; Whiting v. Dewey, 15 Pick. 428.

² Gray v. Briscoe, Noy, 142.

³ Guthrie v. Pugsley, 12 John. 126; Tanner v. Livingston, 12 Wend. 83; Lockwood v. Sturdevant, 6 Conn. 373; Recoys v. Younglove, 8 Baxter, 385. See Blanchard v. Blanchard,

48 Me. 174; Rickert v. Snyder, 9 Wend. 416.

⁴ Mills v. Catlin, 22 Vt. 98; Donaldson v. M. & M. R. R. Co. 18 Iowa, 280.

⁵ Tone v. Wilson, 81 Ill. 529; Scantlin v. Allison, 12 Kan. 851; Guthrie v. Pugsley, 12 Johns. 126; Ela v. Card, 2 N. H. 175; Downer v. Smith, 38 Vt. 464.

⁶ Morris v. Phelps, 5 John. 49.

Kent, C. J., said: "Another question is, whether the defendant ought not to have been permitted to show that the lands in the deed of 1795, of which there was a failure of title, were of inferior quality to the other lands conveyed by the same deed. This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water, with expensive improvements upon it, with ten acres of adjoining barren land, was sold for \$10,000; and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land; would it not be unjust that the grantor should be limited in damages, under his covenants, to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated, and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of extreme injustice if he was obliged to refund nine-tenths of the consideration money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved. . . . The recovery in value upon the warranty at common law was regulated by the same rule. The *capias ad valentiam* was issued to take as much land of the warrantor as was equal to the value of the lands lost. *Cape de terra in bailiva tua ad valentiam tante qual B clamat ut jus suum*; and if the lands of the warrantor lay in another county, different from that in which the lands in controversy lay, then the lands in question were first appraised by a sheriff's inquest, and afterwards the writ went to the sheriff of the other county to take lands of equal value, which value was specified in the writ.¹ If the recovery in the present case had been of an undivided part of all the lands conveyed by the deed, then the rule of apportionment of damages according to the relative value could not have applied, and this distinction runs through the authorities on the subject. But the plaintiff's title failed only to an undivided part of a specified tract, and remained good to another and

¹ Bracton, 384, a, b.

larger tract conveyed by the same deed, and included in the same consideration. The apportionment, according to the relative value, is therefore strictly and justly applicable.”¹ The covenant is broken if the grantor has not the very estate in quantity and quality which he purports to convey.² It is broken if another has a paramount right to divert a natural spring;³ or if the deed contains a conveyance of and covenant for raising a dam to a certain height, and raising it to that height would cause a tortious flooding of lands belonging to third persons.⁴ The covenant extends not only to the land itself, but to all such things as should be properly appurtenant to it, and pass by conveyance of the freehold. Thus it has been held to be broken where the grantor had, before the conveyance, sold to another a quantity of rails which had been erected into a fence, and thereby became a fixture.⁵ And the same doctrine has been applied generally to buildings and other fixtures upon the land, the right to remove which was vested in other parties, and did not pass to the purchaser by the conveyance.⁶ In cases of such breaches, the plaintiff is entitled to recover damages according to the difference in value between the property in the condition it was covenanted to be and its actual condition.⁷

¹ *Blanchard v. Hoxie*, 34 Me. 376; *Hubbard v. Norton*, 10 Conn. 422; *Partridge v. Hatch*, 18 N. H. 494; *Cornell v. Jackson*, 3 Cush. 506.

² *Howell v. Richards*, 11 East, 633.

³ *Clark v. Conroe*, 38 Vt. 469.

⁴ *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 20 id. 292.

⁵ *Mott v. Palmer*, 1 N. Y. 564.

⁶ *Powers v. Dennison*, 30 Vt. 752; *Van Wagner v. Van Nostrand*, 19 Iowa, 427; *West v. Stewart*, 7 Pa. St. 122; *Rawle on Cov. T.* (4th ed.) 78-79.

⁷ *Hall v. Gale*, 20 Wis. 292.

SECTION 4

COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT.

Scope of these covenants—What is a breach—The rule of damages—Where property is the consideration—Rule of damages in England and Canada—The rule of damages in some of the older states—Rule in cases of partial breach—Where the covenantee has extinguished the adverse title—Where the defect is a dower right—By and against whom recovery may be had—When covenantee sues remote grantor—Notice of suit to covenantor—Interest as an item of damage—Expenses, costs and counsel fees as damages.

SCOPE OF THESE COVENANTS.—These covenants are usually treated as synonymous, since a concurrence of the same circumstances is necessary to constitute a breach, since they equally possess the capacity to run with the land, and the rule in respect to the measure of damages is the same as to both.¹ They are assurances to the purchaser and his assigns against a future loss of title to and possession of the granted premises; in other words, their meaning is that neither the grantee nor his heirs and assigns shall be deprived of the possession by force of a paramount title.²

WHAT IS A BREACH.—They are only broken by eviction or something equivalent thereto.³ And the eviction must be alleged and shown to be a paramount title existing before or at

¹ Bostwick v. Williams, 36 Ill. 65; Rea v. Minkler, 5 Lans. 196; Fowler v. Poling, 2 Barb. 300; S. C. 6 Barb. 165; Mitchell v. Warner, 5 Conn. 497; Hennin v. McIntyre, 1 Hawks, 410; Rawle on Cov. T. 208, 215.

² Rindskoff v. Farmers' Loan & Trust Co. 53 Barb. 36; King v. Kerr, 5 Ohio, 154.

³ Id.; Bostwick v. Williams, 36 Ill. 65; Owen v. Thomas, 33 id. 320; Giddings v. Canfield, 4 Conn. 482; McGary v. Hastings, 39 Cal. 360; Woodward v. Allan, 3 Dana, 164; Rickets v. Dickens, 1 Murph. 343; Norton v. Jackson, 5 Cal. 262; Booker v. Merriweather, 4 Litt. 212;

Rickert v. Snyder, 9 Wend. 416; Innes v. Agnew, 1 Ohio, 179; Post v. Campau, 42 Mich. 90; Davis v. Smith, 5 Ga. 274; Hannah v. Henderson, 4 Ind. 174; Woodford v. Leavenworth, 14 id. 311; Simpson v. Hawkins, 1 Dana, 303; Stewart v. Drake, 9 N. J. L. 139; Sisk v. Woodruff, 15 Ill. 15; Crutcher v. Stamp, 5 Hayw. 100; Meek v. Bearden, 5 Yerg. 467; Gilman v. Haven, 11 Cush. 330; Park v. Bates, 12 Vt. 381; Noonan v. Lee, 2 Black, 499; Swazey v. Brooks, 34 Vt. 451; Knapp v. Marlboro, id. 234; Evans v. Lewis, 5 Harr. 162; Stewart v. West, 14 Pa. St. 336; Patton v. McFarlane, 3

the time the defendant made his covenant.¹ Where the grantor had title at law and in equity to the land conveyed, and the breach assigned was the making of a subsequent conveyance which by being first recorded enabled the grantee, under the registry laws, to hold the land, the court held that "the covenant of warranty relates solely to the title as it was at the time the conveyance was made; that it merely binds the grantor to protect the grantee and his assigns against a lawful and better title existing before or at the date of the grant." And that an action would not lie on a general covenant of warranty in such a case.

The decisions are not entirely in accord as to what shall be deemed an eviction for the purpose of recovery on these covenants; but an eviction, or what is deemed equivalent, by paramount title, is essential to the right to damages, and universally required.

THE RULE OF DAMAGES.—The rule of damages is not the same in all the states. In a majority of the states the consideration, or the value of the land at the time of the sale as then agreed upon by the parties, or as determined by the price paid, with interest for such time as the purchaser has been deprived of, or is accountable to the superior owner for the mesne

Penn. 419; *Fuweiler v. Baugher*, 15 S. & R. 45; *Knepper v. Kurtz*, 58 Pa. St. 480; *Clark v. McNulty*, 3 S. & R. 364; *McCoy v. Lord*, 19 Barb. 18; *Greenvault v. Davis*, 4 Hill, 643; *Hamilton v. Cutts*, 4 Mass. 349; *Curtis v. Deering*, 12 Me. 499; *Mitchell v. Warner*, 5 Conn. 497; *Witty v. Hightower*, 12 S. & M. 478; *Carter v. Denman*, 23 N. J. L. 260; *Tufts v. Adams*, 8 Pick. 547; *Flannagan v. Ward*, 12 Tex. 209; *Peck v. Hensley*, 20 id. 673.

¹Id.; *Wade v. Comstock*, 11 Ohio St. 71. In the case of *Knapp v. Marlboro*, the plaintiff and his grantors had been in possession of the premises in controversy for more than half a century, and then he was evicted by a third person; and

it was held in an action against his covenantor, that such long continued possession raised a conclusive presumption that he was not evicted by title paramount.

In *Woodward v. Allan*, 3 Dana, 164, while it admits the necessity of eviction by a paramount title, holds that an allegation that the eviction was by an adverse superior title was sufficient; and that it need not be averred to be an older title if stated to be adverse and not derived from the plaintiff himself. See *Pence v. Duvall*, 9 B. Mon. 48; *Curtis v. Deering*, 12 Me. 499; *Staples v. Flint*, 28 Vt. 794; *Lakens v. Nicholson*, 4 Phil. (Pa.) 22; *Maeder v. Carondelet*, 26 Mo. 112.

profits, together with the costs and expenses incurred in defense of the action by which the injured party was evicted, is the measure of damages for a total failure of title.¹

This measure of damages does not harmonize with the rule which is applied in other cases; nor does it conform to the principle that a party injured by the breach of contract shall receive compensation to such amount that he will be placed in as good condition as if the contract had been performed. This rule of damages for breach of these covenants is founded in the same considerations of justice and policy as that for breach of the covenants of seizin and good right to convey. It is not, however, as logical as in case of the latter covenants; for there the damages are fixed by the value at the time of the breach, and the consideration paid is adopted as the value fixed by the parties. In an early case in Virginia, it was said "the measure of damages is and ought to be the same in case of eviction, whether they be claimed in an action upon a warranty, or

¹*Brown v. Dickerson*, 12 Pa. St. 372; *Cox v. Henry*, 32 id. 18; *Wood v. Kingston Coal Co.* 48 Ill. 356; *Holmes v. Senneckson*, 15 N. J. L. 313; *Dalton v. Bowker*, 8 Nev. 190; *Talbot v. Bedford, Cooke* (Tenn.), 447; *Threlkeld v. Fitzhugh*, 2 Leigh, 451; *Jackson v. Turner*, 5 id. 127; *Lowther v. Commonwealth*, 1 Hen. & Mun. 202; *Crenshaw v. Smith*, 5 Munf. 415; *Stout v. Jackson*, 2 Rand. 132; *Williamson v. Test*, 24 Iowa, 138; *Hallum v. Todhunter*, id. 166; *Earle v. Middleton*, 1 Cheves, 127; *Armstrong v. Percy*, 5 Wend. 535; *Bond v. Quattlebaum*, 1 McCord, 584; *McMillan v. Ritchie*, 3 T. B. Mon. 348; *Morris v. Rowan*, 17 N. J. L. 304; *Hanson v. Buckner*, 4 Dana, 251; *Kennedy v. Davis*, 7 T. B. Mon. 376; *Taylor v. Holton*, 1 Mont. 688; *Cox's Heirs v. Strode*, 2 Bibb, 277; *Drew v. Towle*, 30 N. H. 531; *Harding v. Larkin*, 41 Ill. 413; *Booker v. Bill*, 3 Bibb, 173; *Robards v. Netherland*, id. 529; *Davis v.*

Hall, 2 id. 590; *Marshall v. McConnell*, 1 Litt. 419; *Cummins v. Kennedy*, 3 id. 118; *Pence v. Duvall*, 9 B. Mon. 48; *Robertson v. Lemon*, 2 Bush, 301; *McClure v. Gamble*, 27 Pa. St. 288; *McGary v. Hastings*, 39 Cal. 360; *Davis v. Smith*, 5 Ga. 274; *Phillips v. Reichart*, 17 Ind. 120; *Burton v. Reeds*, 20 id. 87; *Cincinnati, etc. R. R. Co. v. Pearce*, 28 Ind. 502; *Foster v. Thompson*, 41 N. H. 373; *Staats v. Ten Eyck*, 3 Cai. 111; *Bennett v. Jenkins*, 13 John. 50; *Wallace v. Talbot*, 1 McCord, 466; *Grist v. Hodges*, 3 Dev. L. 198; *Lloyd v. Quinby*, 5 Ohio St. 262; *Wade v. Comstock*, 11 Ohio St. 71; *Tong v. Matthews*, 23 Mo. 437; *Swafford v. Whipple*, 3 G. Greene, 261; *Pearson v. Davis*, 1 McMull. 37; *Elliot v. Thompson*, 4 Humph. 99; *Gridley v. Tucker*, Freem. Ch. 209; *Clark v. Burr*, 14 Ohio, 118; *Whitlock v. Crew*, 28 Ga. 289; *Cathcart v. Bowman*, 5 Pa. St. 317.

covenant of seizin or of power to convey, or for quiet enjoyment; that this measure was settled by the common law, upon principles of justice and sound policy, to be the value at the time of the contract, without regard to the increased or diminished value, or to improvements, and the rents and profits for which the tenant is responsible to the successful owner."¹

WHERE PROPERTY IS THE CONSIDERATION.—If the amount of the consideration is not expressly agreed upon between the parties, and has been paid in property, it would follow that the value of that property should be adopted as the basis of damages on a breach of the covenant of warranty, if the consideration paid is adopted as the criterion, as is the case, as we have seen, in assessing damages for breach of the covenant of seizin and power to convey;² but in some cases the value of the land to which the covenant refers is adopted as the criterion. And it has been made a question whether the value for this purpose shall be ascertained at the date of the grant and covenant, or at some earlier date when the contract of sale may have been made. By some of the early cases in Kentucky, a very rigid rule was laid down, making the value of the land lost, estimated at the date of the grant, the basis of recovery, though contracted to be conveyed at a much earlier date. If the consideration was stated in the deed that was conclusive.³ Not because the consideration was the measure of damages, but because it was the value of the granted land fixed by the parties.⁴ In one case, a bond was accepted in 1784, conditioned to convey 500 acres of land as soon as a patent should issue from the register's office; it contained also a provision for the conveyance of other land, equal in value, if that should be lost. It was held that the object of the bond was to provide for the contingency of the land being lost before a deed of conveyance should be executed, and did not extend to an eviction after the execution of a deed of conveyance with general warranty.

In this case there was a breach of the condition of the bond by failing to execute a deed of conveyance; suit was brought,

¹ *Stout v. Jackson*, 2 Rand, 132.
See *Rawley on Cov.* T. 244.

² See ante, p. 262.

³ *McMillan v. Ritchie*, 3 T. B. Mon. 348.

⁴ *Marshall v. McConnell*, 1 Litt. 419.

and in 1805, a compromise made, and a deed with general warranty executed. The value of the land in 1805, when the deed was executed, and not in 1784 with interest, was held to be the measure of damages. The consideration paid was evidence of the value. The deed was deemed to have been received in satisfaction of the bond by the compromise, and to have extinguished all right to proceed upon the bond. The court said: "In deciding upon the amount which should be recovered . . . we must look to the covenants of warranty contained in the deeds of conveyance. It would no doubt have been competent for the parties, when the deeds were executed, by a clause to that effect, to have referred to the condition of the bond, and, by adopting it as part of the covenant of warranty contained in the deeds, made the stipulations in that condition control the recovery on the covenant of warranty. But this they have not done. . . . The amount to be recovered . . . must be regulated by the value of the land at the date of the deeds, and not by the value when the bond was executed; . . . for it is uncontrovertibly settled, by repeated decisions of this court, that the value of the land at the date of the covenant of warranty forms the criterion of damages to be recovered for a breach of the covenant. We know it has been said, and no doubt said correctly, that the consideration given for lands forms a proper inquiry, in actions founded on a breach of the covenant of warranty. It is not, however, because the consideration in itself constitutes the measure of damages, that it is inquired into; but it is resorted to as a means to ascertain the value of the land. The value of the land at the date of the warranty, with interest, forms the measure of damages, and the consideration given for the land constitutes evidence of that value; and where the amount of the consideration is definite and certain, it forms evidence of a very persuasive and satisfactory character of the true value. It ought, perhaps, in such a case, to be conclusive on the parties; for as it shows the value which the parties themselves put on the land, if they should be concluded by it, they can have no cause to complain. But where the consideration is not of that fixed and certain character, and consists, as in the present case, in the compromise of a contest between the parties, it can form no rational means of

ascertaining the value of the land. The amount of that consideration is itself uncertain; it cannot be defined by any precise rule, and forms no inquiry in ascertaining the value of the land; but the value of the land must, in such a case, be ascertained by the introduction of other evidence."¹ But in a later case it was held, on a breach of the covenant of warranty, that restitution to the extent of the failure of consideration is the fixed and only stable and consistent rule; that the true criterion is not the value of the land at the time of the eviction, but the amount received for the lost land and all costs incurred in resisting the eviction.²

It is believed that the general rule is to make the consideration paid the basis of recovery, and if that is paid in property at an agreed value, the value so agreed upon is taken as the actual value.³

¹In *Cummins v. Kennedy*, 3 Litt. 118, the court said: "The general rule, settled by a current of authorities, is, that as the conveyance completes the sale, the value of the land conveyed, at the date of the conveyance, with interest and costs, forms the criterion of damages; and also that the price stipulated is the best evidence of that value. And where the parties have shown that price in the conveyance, it would not perhaps be going too far to say that they ought to be concluded by it. Hence, if the consideration was paid a long time before the date of the deed, still, if it is expressed, it would fix the criterion, though the land, when conveyed, had greatly risen in value. In this case, however, the parties have shown what constituted the consideration; but still, its then value is uncertain, because it consisted in land, the price of which was not fixed. It is not necessary now to say, that in every case, parties, where the deed did not fix the price, should be confined to its date, and could, in no case, travel back

and show that the consideration had passed long before, and of course was of less value; for in this case there are circumstances which show that the warranty ought to be measured by the general rule, notwithstanding the contract was made in 1783, with the testator of the defendant." *Marshall v. McConnell*, 1 Litt. 419.

In *Pence v. Duvall*, 9 B. Mon. 48, Judge Breck said: "The criterion of damages in a case of this kind is the value of the land at the time of the sale and interest; and the best evidence of that value is held to be the price given, or the purchase money—not the amount actually paid at the time, but the amount secured or stipulated to be paid. We don't perceive any principle upon which the failure of the grantee to pay the stipulated price can absolve the grantor from his covenants."

²*Robertson v. Lemon*, 2 Bush, 301.

³In *Koestenbaden v. Pierce*, 41 Iowa, 204, the breach of the covenant consisted of a previous condemnation of a strip of land granted for

RULE OF DAMAGES IN ENGLAND AND CANADA.—In England and her Canadian provinces the consideration does not appear to be fixed as the measure of recovery. In *Bunny v. Hopkins*,¹ a sale was made of building lots, with covenants for title, to one who erected buildings thereon and sold them. This purchaser was evicted from part at the suit of a grantee under a prior deed from the covenantor. This covenantor having died, the evicted party was permitted to claim, as a specialty creditor, the value of the property, including the improvements. The master of the rolls said: "I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold."²

the use of a railroad. Day, J., said: "When the parties have by their agreement fixed the value of the premises, without the incumbrance, the sum so fixed is to be regarded as such value, and must be made the basis of estimating the value with the incumbrance. This rule is just to both parties. In an action on a covenant of warranty, the grantee is entitled to recover such sum as will place him in as good condition as if the covenant had not been broken. *Funk v. Cresswell*, 5 Iowa, 62. Suppose, for illustration, the land in question to have been sold for \$1,500, and that, in fact, at the time of sale, it was worth unincumbered only \$1,000, and that the incumbrance depreciates its value \$500. Then, if the actual value of the land, at the time of sale, incumbered and unincumbered, is to be made the basis of damages, the grantee could recover only one-third of the consideration paid, although the land is depreciated in value one-half. This does not place him in the condition he would have occupied if no incumbrance existed. Upon the other hand, suppose the price paid is \$1,000, and that the actual value of the land unincumbered is \$1,500,

and the value as incumbered is but \$500, making the depreciation \$1,000. Then, upon the basis of the actual incumbered and unincumbered value, the grantee would recover the whole consideration paid, and he would have the land for nothing. The true rule is this: If the land is worth \$1,500 without incumbrance, and \$1,000 with it, it is damaged to the extent of a third of its value, and if sold for \$1,000, the purchaser is damaged $\$333\frac{1}{3}$."

¹ 27 Beav. 565.

² In the later case of *Hodgins v. Hodgins*, 13 U. C. C. P. 146, the plaintiff's father, by indenture of bargain and sale, conveyed to him certain land, the dower of the grantor's wife, the plaintiff's step-mother, not being barred in the deed, whereby he (the grantor) covenanted for quiet enjoyment, in consideration, among other things, of five shillings. Upon the grantor's death, his widow brought an action for dower against the grantee, and recovered judgment, and this action is brought by the covenantee against the grantor's executors for breach of the covenant for quiet enjoyment. Upon a special case it was held that the measure of damages

THE RULE OF DAMAGES IN SOME OF THE OLDER STATES.—It is not surprising that in a country where the value of real estate fluctuates very little, and its value is seldom suddenly increased by expensive improvements, that damages for breach of these

in an action founded on a breach of a covenant for quiet enjoyment was not to be governed by the consideration money in the deed of conveyance, and therefore that the plaintiff was entitled to substantial damages, and was entitled to the value of the crops lost by reason of the eviction. But because the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action against the plaintiff, and of the defense of the same, were disallowed. Draper, C. J., in the course of his opinion, said: "The widow of the testator brought an action of dower against the now plaintiff, who was testator's son by a former wife, and recovered judgment. He defended the action. The damages he claims now consists of the following items:

	£	s.	d.
The demandant's costs, etc., in her action of dower	24	2	0
The now plaintiff's costs of defending that action	10	7	1
The value of plaintiff's growing crops upon the portion of land assigned by metes and bounds to demandant	27	10	0
The value of the life interest of the demandant in the land purchased by plaintiff	100	0	0

"The court are to decide what part, if any, of the above sums should be disallowed. It further appeared that the consideration mentioned to have been paid by the plaintiff to the testator, in the deed containing

the covenants sued on, was only 5s., and the court are called upon also to determine whether this affects, and if so, to what extent, the plaintiff's right to recover, and to reduce the verdict accordingly. So far as I can gather from the English decisions, and they are not numerous, the consideration actually paid or expressed in the deed does not affect the amount of damages recoverable in an action for breach of covenant for quiet enjoyment; and upon the principle of some of the cases which I refer to below, I think it clear that the plaintiff has a right to recover for the crops he has lost, and the price he has had to pay to secure quiet enjoyment for the future of all the land which the testator conveyed to him. These damages have been ascertained.

"No consideration was proved, except what appeared on the face of the deed, which according to the pleadings appears to be 'in consideration, among other things, of five shillings.' This is obviously a merely nominal consideration, and consequently cannot be treated as the price agreed upon between the vendor and vendee as the actual value of the land. The foundation, therefore, of the alleged rule, recognized or established in the case of *McKinnon v. Burrows*, 3 U. C. Q. B. (old series) 590, is wanting. When it is shown that the grantor was father to the grantee, . . . we may fairly assume that the true consideration was natural love and affection, coupled probably with a desire to provide at once for the child

covenants should be measured by the value of the land at the time of the loss by failure of title and eviction. This rule obtained an early and firm footing in New England, and was for a time in some degree recognized in the early days of other

of his first wife. Suppose such a consideration to have been expressed without even a nominal money consideration, with full covenants for title, and the vendor's own title to have proved defective, the plaintiff would either have been entitled to the indemnity now sought as to the dower, or the covenants would be wholly nugatory.

"The plaintiff's cause of action does not arise from a latent defect in the vendor's title which existed when he acquired it. The right of dower was, at the date of the conveyance, to the plaintiff, only inchoate, and springs from the vendor's own act, against which he expressly covenants. The action is upon the covenant for quiet enjoyment, which differs from that of title. The latter is broken as soon as entered into, and the damages for that breach are, not without sufficient reason, referred to the time of the breach. Hence the purchase money and interest thereon have been held to form the true measure of damages, and the value of the improvements made by the purchaser have been generally excluded from consideration. In this case there was no breach until the vendor died; for till then the right of dower was not consummated. If the time of the breach is to be referred to as affecting the measure of damages, then the plaintiff is entitled to the amount by which the value of the estate granted is diminished, which amount may be given him without conflicting with the decisions that he shall not

recover for improvements made by himself before the breach. None of those decisions, I believe, was in a case where the eviction was made by a dowress, deriving her right from the vendor's, and as the authorities seem to establish that she has a right to be endowed of the value at the death of her husband, there would be some ground for a distinction as to the amount of damages recoverable in such a case by the husband's vendee for the eviction, and for taking into account the value of his improvements; but it is not necessary to decide this question, as the parties have not raised it." After citing and stating the doctrine laid down in *Bunny v. Hopkins*, the learned judge continues: "Here the plaintiff seeks only an amount which will satisfy him for not obtaining what the testator covenanted to give him, viz., uninterrupted quiet enjoyment. He asks satisfaction for a partial and temporary interruption. If the vendor had covenanted that, in the event of his wife surviving him, a sum equal to the value of her dower should be paid the plaintiff as an indemnity, the plaintiff's right to that sum could not have been questioned. Looking at all the circumstances of the present case, I think the covenant for quiet enjoyment entitles the plaintiff to a similar indemnity; and that the sum paid to compromise the widow's claim, and the value of the crops lost by the plaintiff, should be allowed to him."

older states.¹ In Maine,² Vermont,³ Massachusetts,⁴ and Connecticut,⁵ it has been adhered to.

In the newer portions of this country, the value of real estate rapidly advances with a general or local increase of population; and such increase has been steady and wide-spread. The regions thus occupied are dotted with cities and villages, built where but lately land was worth little more than government price. A parcel of land sold for five hundred dollars has not unfrequently been so built upon, and so surrounded with improvements, that before an adverse title would be barred by the statute of limitations, it has been worth a million of dollars. If the purchaser is evicted by a paramount title, it seems unjust that he should have a legal demand against a vendor who received the \$500 to make good the loss. The parties had equal means of learning the actual state of the title. The sudden increase of value was not in the contemplation of the vendor. So far as it was the result of improvements, he did not consciously become a guarantor. The party making such improvements proceeded on his own judgment, and with a view to his own advantage, with equal knowledge of the title. The rule of damages generally adopted is a reasonable limitation of the vendor's responsibility, and equalizes and apportions between the parties, according to their respective interests, the hazard of loss from failure of title.⁶

RULE IN CASE OF PARTIAL BREACH.—For a partial breach damages will be assessed, *pro tanto*, according to the recognized

¹Liber v. Parsons, 1 Bay, 19; Guerard v. Rivers, id. 265; Erebright v. Still, id. 92; Witherspoon v. McCalla, 3 Desaus. 245; Nelson v. Matthews, 2 Hen. & Munf. 164; Mills v. Bell, 3 Call. 277.

²Cushman v. Blanchard, 2 Greenlf. 268; Swett v. Patrick, 12 Me. 9; Hardy v. Nelson, 27 id. 525; Elder v. True, 30 id. 104; Doherty v. Dolan, 65 id. 87.

³Drury v. Shumway, D. Chip. 111; Park v. Bates, 12 Vt. 381; Keith

v. Day, 15 id. 660; Keeler v. Wood, 30 id. 242.

⁴Gore v. Brazier, 3 Mass. 523; Caswell v. Wendell, 4 id. 108; Bigelow v. Jones, id. 512; Norton v. Babcock, 2 Met. 516; White v. Whitney, 3 id. 81. See Sumner v. Williams, 8 Mass. 221.

⁵Horsford v. Wright, Kerby, 3; Sterling v. Peet, 14 Conn. 245.

⁶See King v. Kerr, 5 Ohio, 154. In Wade v. Comstock, 11 Ohio St. 71, the court say the rule is adopted on principles of public policy.

standard of damages for a total breach. Thus, for example, if the conveyance is made of several parcels, and the grantee is evicted by paramount title from one of them, the value of that parcel, measured by the consideration, or the valuation at the date of eviction, as the rule may be, will be the measure of damages.¹ Applying the same rule to a case where a part of one parcel is lost by failure of title, or the title to the undivided part of the whole, the measure of damages is a ratable part of the consideration or value of such parcel, or of the entirety, ascertained in the same manner.² The object of the law being compensation according to the standard which has been indicated, any partial compensation, realized as an occupant, rendering the eviction less than a total loss, may reduce the recovery; as where the plaintiff has recovered from evictor a sum for betterments, which passed to the covenantee with the land at the time of the sale.³

If the eviction is by some paramount charge or lien which may be discharged by payment of a sum not larger than the damages which would be recoverable if the eviction were under an absolute paramount title, as where a mortgagee enters for the purpose of foreclosure, the measure of damages is the

¹ *Dickins v. Sheppard*, 3 *Murph.* 526; *Raines v. Calloway*, 27 *Tex.* 678; *Griffin v. Reynolds*, 17 *How. U. S.* 609; *Morris v. Harris*, 9 *Gill*, 19; *Dougherty v. Duvall's Heirs*, 9 *B. Mon.* 57; *Hunt v. Orwig*, 17 *id.* 73; *Boyle v. Edwards*, 114 *Mass.* 373; *Williams v. Beeman*, 2 *Devereux*, 483; *Major v. Donnoyant*, 25 *Ill.* 262; *Hoot v. Spade*, 20 *Ired.* 326; *Dimmick v. Lockwood*, 10 *Wend.* 142. See *King v. Ryle*, 8 *S. & R.* 166; *Adams v. Conover*, 22 *Hun.* 424; *Mischke v. Baughn*, 52 *Iowa*, 528; *Long v. Sinclair*, 40 *Mich.* 569.

² *Id.*: *Downer v. Smith*, 38 *Vt.* 464.

³ *Booker v. Bell*, 3 *Bibb*, 173; *King v. Kerr*, 5 *Ohio*, 154; *Drury v. Shumway*, D. *Chip. (Vt.)* 111; *Mason v. Kellogg*, 38 *Mich.* 132. In *Drew v. Towle*, 30 *N. H.* 531, it was held that

a grantee of land under a deed containing covenants of warranty, who goes into possession, owes no duty to the grantor to remain in possession for the purpose of litigating a question of the increased value of the estate from betterments while in possession of those under whom he claims, but may at once surrender to any one having the paramount title; and no deduction will be made from the damages to which he would otherwise be entitled by reason of any such claim of betterments of which he might have availed himself. This seems to ignore the duty of a plaintiff to exert himself to lessen damages. See vol. 1, p. 148. *Weed v. Larkin*, 49 *Ill.* 99. See *Franklin v. Smith*, 21 *Wend.* 624; *Barmon v. Lithauer*, 4 *Keyes*, 317.

amount of the debt so secured.¹ In *Tufts v. Adams*,² land was granted by A to T with covenants against incumbrances and of general warranty, but incumbered by a mortgage to C, on which C subsequently recovered conditional judgment and obtained possession of the land. While the land continued in T's possession, he mortgaged it for a smaller amount than C's mortgage. After C thus obtained possession, T brought an action against A for breach of the covenants. And it was held: 1st. That the covenant against incumbrance was broken when the deed was executed, but that T could recover only nominal damages, as he had paid nothing to remove the incumbrance; 2d. That the covenant of warranty was broken, and that the damages recoverable in the action was the amount of C's judgment for debt and costs, deducting the amount of the mortgage which T had himself made; also, that if T, before judgment, paid off the mortgage made by himself, he could recover the whole amount without such deduction. In such cases the recovery is limited to the sum which would be sufficient to extinguish the adverse claim if the action on the covenant is brought while the adverse claim is defeasible. But it has been held that a covenantee so evicted is not obliged to redeem, and that, after the redemption expires and the title under the foreclosure becomes absolute, he may recover full damages.³ But it would be otherwise if the covenantee owed purchase money to the covenantor, presently payable, and sufficient in amount to discharge the incumbrance or redeem the land.⁴ So, if the covenantor leave in the hands of the covenantee money sufficient to remove the incumbrance, and the latter undertakes to procure a discharge of it, the covenant of warranty is satisfied.⁵

¹ *Donohoe v. Emery*, 9 Met. 63; *Tufts v. Adams*, 8 Pick. 547; *White v. Whitney*, 3 Met. 81; *Winslow v. McCall*, 32 Barb. 241; *Holbrook v. Weatherbee*, 12 Me. 502; *Fumas v. Durgin*, 119 Mass. 500.

² 8 Pick. 550.

³ *Elder v. True*, 32 Me. 104; *Lloyd v. Quinby*, 5 Ohio St. 262; *Stewart v. Drake*, 9 N. J. L. 139; *Miller v. Halsey*, 14 id. 48; *Burk v. Clements*,

16 Ind. 132; *Chapel v. Bull*, 17 Mass. 213; *Norton v. Babcock*, 2 Met. 510. See *Smith v. Dixon*, 27 Ohio St. 471.

⁴ *Harper v. Jeffries*, 5 Whart. 26; *McGinnis v. Noble*, 7 W. & S. 454; *Mellon's Appeal*, 32 Pa. St. 121; *Copeland v. Copeland*, 30 Me. 446; *Pitman v. Connor*, 27 Ind. 337.

⁵ *Blood v. Wilkins*, 43 Iowa, 565.

WHERE COVENANTEE HAS EXTINGUISHED ADVERSE TITLE.—Where the grantee purchases the land upon the foreclosure of a mortgage existing prior to the grant, this will give him a right of action on the covenants to the extent of the amount paid by him to relieve the land.¹ He cannot increase his recovery, in such a case, by assigning his bid to another and permitting him to obtain a deed.² So in other cases; if the covenantee has extinguished the adverse title, his recovery on any of the covenants will be limited to the amount paid by him for that purpose, including the incidental expenses and reasonable compensation for his trouble, not exceeding in all the limit of damages for a total breach.³ In *Dale v. Shueley*,⁴ the holders of the paramount title were Indians, and had to be hunted up in the Indian Territory; and their conveyances had to be approved by the secretary of the interior; and it was held that the party so procuring the adverse title was entitled to pay for his time and trouble, his traveling expenses and the amount paid for the title.

In *Leffingwell v. Elliott*,⁵ counsel fees paid were disallowed, but the court held that if the plaintiffs were put to trouble and expense in extinguishing the paramount title, he was entitled to compensation therefor; that he might recover for time thus employed, for expense of horses and carriages, and for board, as well as the expense of preparing for trial and attendance at court. This action was brought on the covenants against incumbrances and of warranty, and the plaintiff presented three classes

¹ *McGinnis v. Noble*, 7 W. & S. 454; *Andrews v. Appel*, 22 Hun, 429; *Cowdrey v. Coit*, 3 Robt. 210; S. C. 44 N. Y. 383; *Burk v. Clements*, 16 Ind. 132. See *Whitney v. Dinsmore*, 6 Cush. 124.

² *Cowdrey v. Coit*, *supra*.

³ *Leffingwell v. Elliott*, 10 Pick. 204; S. C. 8 id. 457; *Thayer v. Clemence*, 22 Pick. 490; *Estabrook v. Smith*, 6 Gray, 572; *McGary v. Hastings*, 39 Cal. 360; *Lewis v. Harris*, 31 Ala. 689; *Swett v. Patrick*, 12 Me. 9; *Kelly v. Low*, 18 id. 244; *Fawcett v. Woods*, 5 Iowa, 400; *Dale*

v. Shueley, 8 Kan. 276; *Spring v. Chase*, 22 Me. 505; *Hurd v. Hall*, 12 Wis. 112; *Claycomb v. Munger*, 51 Ill. 373; *Bailey v. Scott*, 13 Wis. 619; *Loomis v. Bedel*, 11 N. H. 74; *McKee v. Bain*, 11 Kan. 569; *Yokum v. Thomas*, 15 Iowa, 67; *Dickson v. Desire*, 23 Mo. 151; *Lane v. Fury*, 31 Ohio St. 574; *Allis v. Nininger*, 25 Minn. 525; *Richards v. Iowa Homestead Co.* 44 Iowa, 304; *Jones v. Lightfoot*, 10 Ala. 17. See *Brady v. Spruck*, 27 Ill. 478.

⁴ 8 Kan. 276.

⁵ 10 Pick. 204.

of claims. The first was for expenses incurred, and money paid to extinguish the outstanding title before the commencement of the action on the covenants. Of this class the auditor stated an account in which, besides the sums paid to extinguish the adverse titles, with interest from the time of the payments, there were charges for the plaintiff's time employed in extinguishing the titles, with interest from the service of the writ; for incidental expenses for horses and carriages, board and lodgings, while the plaintiffs were from home, and interest from the time the same were paid; and for sums paid for advice and services of counsel. The second class was for expenses incurred and payments made, similar to those in the first class, subsequently to the service of the writ, not, however, including counsel fees. The third class was for expenses and charges incurred in preparing this case for trial, including the summoning of witnesses, attendance at court, personal services of the plaintiffs, and counsel fees since the commencement of the suit. The court allowed in full the sums reported by the auditor in the first and second classes, except counsel fees; and they were not allowed in the third class.¹

¹In *McKee v. Bain*, a deed of a vacant lot had been given by defendant to the plaintiff in 1868, containing covenants for title and good right to convey, for the consideration of \$6,050, of which \$2,050 was paid down, the balance being secured by notes and a mortgage of the lot payable in one and two years. McKee took possession of the lot and made permanent and valuable improvements on it. Afterward, Thomas, claiming the paramount title, brought ejectment against McKee, and recovered judgment in 1870. Bain had notice of the pendency of this suit. The defendant obtained the benefit of the occupying claimant law, and the lot was valued at \$5,000; and the improvements at \$14,700. Thomas elected to take \$5,000 for the lot, and the court ordered McKee to pay it. This

sum being paid, a deed to McKee was made by Thomas in 1872. In the defense of that action, McKee incurred \$500 for counsel fee, and the costs recovered in that suit by Thomas were \$196.25. The court trying the action upon the covenants found that the counsel fee was excessive beyond \$400. McKee brought an equitable action against Bain on the covenants of seizin and warranty in the deed, asking judgment for the amount paid down, for the amount paid in costs and counsel fees, and interest on those several amounts; also, that the notes and mortgage be canceled, and that the apparent incumbrance resting upon the title by virtue of the mortgage be removed. Valentine, J., said: "The covenant of seizin is broken as soon as made, if the title attempted to be conveyed is bad;

But it has been held¹ that a vendee who is legally evicted, and who thereupon repurchases the property from the evictor,

and when the vendee afterwards buys in the paramount title, the measure of his damages, as against the vendor, is, as a rule, the amount with interest it necessarily costs to obtain the paramount title up to the amount of the purchase money and interest. In some cases the vendee may also recover the costs and attorney's fees necessarily paid by him in prosecuting or defending a suit, with reference to the land attempted to be conveyed. In the present case, we think Mrs. McKee is entitled to recover from the Bains just the excess of what she has necessarily and actually paid over and above what she agreed to pay to the Bains. For instance: She agreed to pay as follows: cash down, \$2,050; two notes, \$4,000; interest on the notes to March 19, 1872, \$1,555.55; — total agreed to be paid up to March 19, 1872, \$7,605.55. She actually and properly paid as follows: Cash down, \$2,050; attorney's fees, \$400; costs, \$196.25; for paramount title March 19, 1872, \$5,000; — total paid March 19, 1872, \$7,646.25. She therefore paid \$40.70 more than she agreed to pay for the lot. The judgment in this case was rendered November 16, 1872, for \$43.50, a little more than \$40.70 and interest. . . . The title of the Bains to said lot was derived through judicial proceedings, and although defective on account of irregularities, . . . yet it cannot be wholly ignored. The title was apparently good. The Bains acted in good faith in selling, and Mrs. McKee acted in good faith in purchasing and defending. Mrs. McKee obtained possession of said lot under and by virtue of Bain's title, and she held possession thereunder for nearly four years without

paying anything therefor to the Bains, or to any one else, except what she paid as consideration for the lot; and she still continues to hold such possession, never having been in fact dispossessed. Bain's title, though defective, rested as a cloud upon the paramount title. By virtue of said conveyance from Bain to McKee, this cloud was extinguished, or rather transferred from the Bains to Mrs. McKee. This was something of value. And after the action between Mrs. Thomas and Mrs. McKee was determined, the right of Mrs. McKee to compel Mrs. Thomas to purchase Mrs. McKee's improvements on said lot, and pay therefor \$14,700, or to sell the lot to Mrs. McKee, under the occupying claimant law, for \$5,000, was founded solely upon the title which Mrs. McKee obtained from the Bains. The title, therefore, which she got from Mrs. Thomas had its origin in the title she got from the Bains. Besides, Mrs. McKee appeals to a court of equity to cancel said notes and mortgage. Said mortgage was a cloud, and an apparent if not a real incumbrance upon the title to said lot. Is the removal of said cloud and said apparent incumbrance of no value? Now, by virtue of the conveyance from the Bains to Mrs. McKee, and the judgment in this case, Mrs. McKee has obtained a good title to her lot, free and clear from all incumbrances or clouds, all she bargained for or expected to get, and all that she had any right to expect, and she has paid to all persons in the aggregate, only what she agreed to pay to the Bains. She has lost nothing by the failure of the Bains' title."

¹Martin v. Atkinson, 7 Ga. 228.

is in under a new title, and the price last paid is no criterion of the damages sustained by the failure of the vendor's title.¹ If the covenantee is a mortgagee, on a total breach the mortgage debt is the measure of damages.² And so in every variety of circumstances, the recovery will be graduated to the actual injury.³

Where, after an eviction, possession has been restored, the right of action is not thereby destroyed, but such restoration will go in mitigation.⁴ And so payments on account of such damages may be shown in mitigation.⁵

WHERE THE DEFECT IS A DOWER RIGHT.—Where there is an eviction by a dowress, the measure of damages is the value of the particular right of dower estimated according to the expectation of life of the tenant in dower on the basis of the amount paid being the value of the fee simple.⁶ The cases show many ways of expressing and arriving at this value; as, that it is the amount that the fee simple interest is diminished in value by carving out the life estate, estimating the value of the fee simple interest according to the consideration money paid to the covenantor;⁷ that is, the present value of an annuity equal to the interest on one-third of the consideration money, for the time that the tenant in dower has a probable expectation of life.⁸ The amount reasonably paid for release of the right of dower, or the amount assessed in lieu of it, under statutes which provide for such commutation, will also constitute the basis of recovery for breach of the covenants, where the defect of title is thus cured.⁹ Where the eviction was by paramount title

¹ Compare *Claycomb v. Munger*, 51 Ill. 373; and *Hunt v. Orwig*, 17 B. Mon. 73, 85.

² *Curtis v. Deering*, 12 Me. 499; *Wetmore v. Green*, 11 Pick. 462.

³ *Richards v. Iowa Homestead Co.* 44 Iowa, 304.

⁴ *Baxter v. Ryerss*, 13 Barb. 267.

⁵ *Ferris v. Mosher*, 27 Vt. 218.

⁶ *Stewart v. Matheeson*, 23 U. C. Q. B. 135; *Weslem v. Short*, 12 B. Mon. 153; *Davis v. Logan*, 5 id. 341; *Terry v. Drobenstadt*, 68 Pa. St. 400; *Hill v. Golden*, 16 B. Mon. 551; *Bender v.*

Fromberger, 4 Dall. 436; *Brown v. Dickerson*, 12 Pa. St. 372; *Patterson v. Stewart*, 6 W. & S. 527.

⁷ *Johnson v. Nyce*, 17 Ohio, 66.

⁸ *Wager v. Schuyler*, 1 Wend. 553.

In this case the widow was fifty years of age, healthy and of good habits, and her expectation of life was put at seventeen years.

⁹ *Hodgins v. Hodgins*, 13 U. C. C. P. 146; *Jeter v. Glenn*, 9 Rich. 374; *Maguire v. Riggins*, 44 Mo. 512; *Welsh v. Kibler*, 5 S. C. 405. See *Cuthbert v. Street*, 9 U. C. C. P. 115.

for a term of years, the plaintiff was held entitled to the annual value of the land of which the plaintiff was dispossessed, or the interest on the consideration paid for it.¹

BY AND AGAINST WHOM RECOVERY MAY BE HAD.—As these covenants run with the land they are available to any person succeeding the covenantee by purchase or descent.² It is not necessary that a conveyance be made with warranty in order to pass these covenants; they will pass by release or quit-claim.³ Consequently, the action should be brought by him in whose time the breach occurs.⁴

The covenants are divisible, and their benefits will go to each recipient of any part or interest in the lands to which they relate, and may be sued on separately in respect of any breach as to the portion taken by him.⁵

The evicted grantee may bring suit against the first covenantor, or against any intermediate covenantor; he may bring separate actions against all, either at the same time or succes-

¹ *Rickert v. Snyder*, 9 Wend. 416.

² *Rae v. Hagley*, 12 East, 464; *Rawle on Cov. T.* 561.

³ *Beddoe v. Wadsworth*, 21 Wend. 120; *Wilson v. Widenham*, 51 Me. 566; *Hunt v. Middlesworth*, 44 Mich. 448. See *Claycomb v. Munger*, 51 Ill. 373.

⁴ *Kane v. Sanger*, 14 John. 89; *Bickford v. Page*, 2 Mass. 455, 460; *Keith v. Day*, 15 Vt. 660; *Booth v. Starr*, 1 Conn. 244; *Thompson v. Sanders*, 5 T. B. Mon. 358; *Cunningham v. Knight*, 1 Barb. 399; *Claycomb v. Munger*, 51 Ill. 373; *Crooker v. Jewell*, 29 Me. 527; *Hunt v. Middlesworth*, 44 Mich. 448.

⁵ *Dart on Vendors & P.* 365; *Washb. on R. P.* 400; *Dickinson v. Hoomes*, 8 Gratt. 406; *Brown v. Metz*, 33 Ill. 339; *Kane v. Sanger*, 14 John. 89; *Dougherty v. Duvall's Heirs*, 9 B. Mon. 57; *Twynam v. Pickard*, 2 B. & Ald. 105; *Midgley v. Lovelace*, Carthew, 289; *Paul v. Wetman*, 3 W. & S. 407; *Henniker v.*

Turner, 4 B. & C. 157; *Sweet v. Patrick*, 12 Me. 9; *Lamb v. Danforth*, 59 id. 322. In *Dart on Vend. & P.* 365, it is said: "Where the estate is divided, as where it becomes vested in A for life, remainder to B in fee, and the breach of covenant affects the entire inheritance, each can sue for damages proportioned to the extent of his estate." *Noble's Case*, 2 Sim. 343. Compare *McClure v. Gamble*, 27 Pa. St. 288. And on p. 366, this author says: "Where the estate is merely equitable, there can be no assignee at law, and the covenants cannot be enforced at law by an equitable assignee; so, if the conveyance, although so intended to do, do not, in fact, pass any legal estate, it appears that the assignee cannot sue; but, in either case, the assignee, although unable to sue in his own name, would be entitled to sue in the name of the original covenantee. See *Riddell v. Riddell*, 7 Sim. 529."

sively, and prosecute them to judgment; but he is entitled to but one satisfaction and his costs.¹

WHEN COVENANTEE SUES REMOTE COVENANTOR.—Where the action is brought by a remote grantee, there is some diversity as to the criterion of damages. Is it the consideration paid to the original covenantor, who is the defendant, or the consideration paid by the plaintiff to his grantor? In Kentucky the rule is the consideration received by the defendant.² In one case a suit was brought by a remote grantee, and it was sought to limit the plaintiff's recovery to the amount paid by him; and it was insisted in behalf of the defendant, that the plaintiff should disclose the amount which he had paid. The court said: "It does not appear what amount he paid for it, nor was he called upon to state, nor was it shown in any other way. If it were conceded that the plaintiff's recovery ought to be limited to the amount paid by him for the superior title, were that amount manifested, it cannot be so limited, as this amount is not made to appear. Nor do we perceive that it was the duty of the plaintiff to disclose the amount in order to limit his recovery without his being called upon to do so. *Prima facie* the plaintiff had a right to recover the consideration in the deed of (the covenantor) proportioned to the land lost, and this is the amount decreed by the court."³ In South Carolina, North Carolina, and Maryland, the basis of recovery is the consideration paid by the plaintiff to his immediate grantor,⁴ with interest and costs of the ejectment suit, in all not exceeding the consideration received by the defendant.⁵

¹ King v. Kerr, 5 Ohio, 154; Wilson v. Taylor, 9 Ohio St. 595; Dougherty v. Duvall, 9 B. Mon. 57; Crooker v. Jewell, 29 Me. 527; Claycomb v. Munger, 51 Ill. 373; Crisfield v. Storr, 36 Md. 129; Williams v. Beeman, 2 Dev. 483; Hunt v. Orwig, 17 B. Mon. 73; Lot v. Parish, 1 Litt. 393; Lowe v. McDonald, 3 A. K. Marsh. 354; Birney v. Hain, 2 Litt. 262; Thompson v. Sanders, 5 T. B. Mon. 358; Birney v. Hann, 3 A. K. Marsh. 322; Withy v. Mumford, 5

Cow. 137; Garlock v. Closs, id. 143, note; Suydam v. Jones, 10 Wend. 180.

² Dougherty v. Duvall, 9 B. Mon. 57.

³ Hunt v. Orwig, 17 B. Mon. 73.

⁴ Crisfield v. Storr, 36 Md. 129; Williams v. Beeman, 2 Dev. 483; Lawrence v. Robertson, 10 S. C. 8.

⁵ In Williams v. Beeman, Henderson, C. J., said: "In actions between the vendee and his immediate vendor upon the covenant for

In Missouri the rule has been thus stated: "If a subsequent purchaser be evicted, the damage is the value of the land at the

quiet enjoyment, it is the settled law of this state, that the value of the lands, at the time of the sale, shall be the measure of the damages; and in case of actual sales, the purchase money is conclusive evidence of that value. This is the case where a covenant of warranty is annexed to an estate in fee, and the eviction is from the whole estate. What may be the rule, where there is a partial eviction of the estate, or other interest less than a fee, or where the covenant is annexed to an estate less than a fee, is, as far as I know, not determined by our courts. The interest upon the purchase money is merely incidental, and depends on the circumstances of each case. It ordinarily runs during the time that the tenant is liable for the profits to the rightful owner. When he is not so liable, the profits are set off against it. Had this action, therefore, been brought against Glasgow, Williams' immediate vendor, it would have presented no difficulties, governing ourselves by former decisions. Is the case varied by being brought against Beeman, a remote vendor, and whose estate, with his covenants annexed thereto, have come to Williams? I think that it is not; for Beeman cannot be bound to pay to Williams more than Williams ought to receive. If he has money in his hands belonging to some other person, there is no reason why it should be paid to Williams. Now it is settled that the purchase money paid by Williams to Glasgow is the measure of Williams' damages, and the fact that he is substituted to the estate of Sheppard, and to the covenants entered into with Sheppard

for its enjoyment and protection, does not thereby substitute him to Sheppard's claim to damages, in case the latter had been evicted. He is only substituted to Sheppard's covenants to redress his own, not Sheppard's injuries, in regard to the estate. But as there is no privity of contract between Williams and Beeman, the injury of the former cannot exceed the liability of the latter upon his covenants. But it may fall short of it. Neither would the case be varied if the action had been brought by Sheppard, as it is said it might be. For Sheppard having sold to Glasgow, and Glasgow to Williams, he, Sheppard, could only claim an indemnity, which is the amount of the consideration money paid by him who is evicted. And on this ground alone, or that he is trustee for the person evicted, can the action be sustained in his name. In either case, Williams' injury is the one to be compensated. Should it be asked what is to become of the excess left in the hands of Beeman—for it is certain that he has given nothing for it—it is answered, who can claim it? Not Williams, for under the rule established by our decisions he has no pretense to recover it. Not Sheppard, for he sustains no damage by the bad title, further than he may be compelled to comply with the covenants in his deed. And it would be strange that he should be placed in a better situation by selling a bad title than a good one. For had the title been good, he must have been content with his loss upon his resale. Should it turn out to be bad, could he then regain his whole purchase money? In fact, the difference

time of the eviction, not exceeding, however, the sum for which the covenantor would have been liable to the first purchaser."¹

An intermediate grantee may recover against an antecedent covenantor if he has suffered actual injury, though the eviction did not occur while he held the estate. If he conveyed without covenants to the evicted grantee for full value, he suffers no injury and has no right of action.² But if he conveyed with covenants and has satisfied them, the covenants are restored to him, and he may sue any covenantor from whom he claims for his indemnity.³

between what he gave and what he got for the land is sunk, is extinguished, and there is no person who can receive it, by making a re-sale at a reduction in the price. The first vendee submits to the loss, and it can therefore form no part to a claim to an indemnity."

¹ *Dickson v. Desire*, 23 Mo. 151.

² *Booth v. Starr*, 1 Conn. 244; *Wyman v. Ballard*, 12 Mass. 304; *Niles v. Sawtell*, 7 id. 444.

³ *Claycomb v. Munger*, 51 Ill. 373; *Baxter v. Ryerss*, 13 Barb. 267; *Lot v. Parish*, 1 Litt. 393; *Wheeler v. Sohier*, 3 Cush. 219; *Thompson v. Sanders*, 5 T. B. Mon. 358; *Herrin v. McEntyre*, 1 Hawks, 410. In *Birney v. Hann*, 3 A. K. Marsh. 322, *Mills, J.*, said: "The question whether an intervening grantee, who had conveyed away the estate, can support the same action against a remote grantor, has never yet been decided. On this question we need not look for any aid from English precedents, where such an action of covenant is not indulged. In this case the plaintiff below has averred that Fields and Dunn, who were evicted from the lot, recovered a judgment against him on his warranty for the value of the land, with interest and costs, which judgment he had fully paid and discharged before the commencement of this

suit. If this statement in the declaration can be material to, or aid him in support of his action, as it is not contradicted by any plea, it must be taken as true, and the plaintiff below is entitled to the benefit of these facts. The question remains, will they affect his case and enable him to support his action? As Hann would have been entitled to the action if he had never conveyed; as he has been subjected to the action because he had conveyed; as the estate passed by the title has gone into other hands; and his deed to Fields and Dunn can be of no more avail to them, because they have once had the benefit of it, and it is now inoperative against Hann, because it is merged in the judgment against him, and discharged by payment, we see no good reason why Hann should not be adjudged to have the right of action revested in him, and he restored to all he parted with by his deed. As much so as if Field and Dunn had reconveyed. As the indorser of a commercial instrument, who has paid its contents, can sustain his action against his remote indorser without a reindorsement, because his own indorsement, by the act of payment, *per se*, has become *functus officio*, as to him. So ought Hann, who has rendered his own deed inoperative further

The tenant who is evicted may sue any prior covenantor, and if he elects any but the first, and obtains satisfaction for his claim, such covenantor may, thereby, stand as to any prior covenantor, in the place he held before he had parted with the estate, and sue upon his covenant as though the breach had occurred during his ownership.¹

Where a grantee has been evicted by virtue of a judgment against him, the judgment is legally admissible to prove the eviction in an action on the covenant in the deed;² but not to prove that such eviction was by paramount title, unless the covenantor was vouched in to defend.³ But if the covenantor had notice of that action and an opportunity to appear and defend, the judgment of eviction is evidence, and conclusive, of the title.⁴ The same principle has been applied in cases of judgments against the grantee in actions brought by him to recover the granted property, where the covenantor had been notified to take upon himself the prosecution of such action.⁵

NOTICE OF SUIT TO COVENANTOR.—One who is sued upon his covenant of warranty may vouch in his warrantor, and he, in turn, may vouch in his; and a judgment in such action, so far as the subject matters tried in such suit are concerned, will be binding upon the rights of any such previous warrantor, who has

against him, to be restored to the situation he was in before it was made, without a conveyance formally executed." *Hunt v. Middlesworth*, 44 Mich. 448.

¹ Wash. R. P. 400; *Withy v. Mumford*, 5 Cow. 137; *Thompson v. Shattuck*, 2 Met. 618; *Suydam v. Jones*, 10 Wend. 184; *Booth v. Starr*, 1 Conn. 244; *Markland v. Crump*, 1 Dev. & B. L. 94; *Redwine v. Brown*, 10 Ga. 311.

² *Hardy v. Nelson*, 27 Me. 525; *Gaither v. Brooks*, 1 A. K. Marsh. 409; *Patton v. Kennedy*, id. 389; *Middleton v. Thompson*, 1 Spears, 67; *Crisfield v. Storr*, 36 Md. 129.

³ *Id.*; *Harding v. Larkin*, 41 Ill.

413; *Ryerson v. Chapman*, 66 Me. 557; *Sheetz v. Longlois*, 69 Ind. 491.

⁴ *Id.*; *Hamilton v. Cutts*, 4 Mass. 349; *Blasdale v. Babcock*, 1 John. 518; *Sanders v. Hamilton*, 2 Hayw. 282; *Dalton v. Bowker*, 8 Nev. 190; *Fulweiler v. Bangher*, 15 S. & R. 45; *Jeter v. Glenn*, 9 Rich. 374; *Farrell v. Alden*, 8 Humph. 44; *Knapp v. Marlboro*, 34 Vt. 234; *Ferry v. Drabenstadt*, 68 Pa. St. 400; *Williamson v. Williamson*, 71 Me. 442.

⁵ *Dalton v. Bowker*, 8 Nev. 190; *Ryerson v. Chapman*, 66 Me. 557. But see *Ferrell v. Alden*, 8 Humph. 44; *Wilder v. Ireland*, 8 Jones' L. 85.

been properly vouched in or summoned in to take the defense of the suit, whether he does so or not.¹

INTEREST AS AN ITEM OF DAMAGE.—Interest is not recovered when the premises have been occupied by the warrantee, and he has not accounted nor is accountable for the rents and profits. It would be unjust. He who buys a farm, or house and lot, agrees to part with the use of the consideration forever, for the use of the farm or house and lot forever. As long as he has the use of the farm, or house and lot, so long should the seller have the use of the consideration.² In such case, the use and occupation are presumed to be equal to the use of the purchase money.³ And if not, the grantee has no ground for complaint while he is undisturbed in the enjoyment of that for which he was content to pay the purchase money.⁴

In case of eviction by the owner of the superior title, he is entitled to recover mesne profits for such period as is allowed by the statutes of limitation. For this period the grantee is treated as not enjoying the granted premises in virtue of the

13 Wash. R. P. 402; *Chamberlain v. Preble*, 11 Allen, 373; *Boston v. Worthington*, 10 Gray, 498; *Littleton v. Richardson*, 34 N. H. 187; *Andrews v. Denison*, 16 N. H. 469; *S. C.* 17 N. H. 413; *Mason v. Kellogg*, 38 Mich. 132. In this case it was held that the notice to the covenantor should be in writing.

²*King v. Kerr*, 5 Ohio, 154.

³*Wood v. Kingston Coal Co.* 48 Ill. 356; *Harding v. Larkin*, 41 Ill. 413; *Cox v. Henry*, 32 Pa. St. 18; *Sumner v. Williams*, 8 Mass. 162. 221. In this case, *Sedgwick, J.*, said: "Covenants having been broken at the time of the execution of the deed, a cause of action immediately accrued. The real injury was then sustained, and the amount of indemnity for it precisely the money which had been paid for a defective title. In such a case as this, if

the grantee cannot enter into possession, he is entitled to demand immediately the money which he has paid; and if he receives it, it must be deemed a satisfaction of the injury. If there is delay, there must be interest on the amount of the purchase money, commensurate with the delay; and that interest the law deems a satisfaction for the delay. If the grantee enters into possession, the profits of the improvements are deemed equivalent to the interest; but as he may be compelled to account for those profits, and pay them over to the owner, he is for that reason entitled to demand the interest, with the purchase money, in an action upon his covenant." See *Selden v. James*, 6 Rand. 465.

⁴*Spring v. Chase*, 22 Me. 505; *Kyle v. Fountelroy*, 9 B. Mon. 620.

grant; and for the time he is so liable, as well as for the time succeeding actual eviction, or the fact which is treated as equivalent thereto, interest is recoverable on the principal of the damages allowed.¹

Wherever the circumstances are such as to preclude any recovery for mesne profits, interest will not be allowed until eviction.² Thus, where the grantee was evicted by a later patent, as he was not liable to the evictor for profits prior to the patent, there was no right to interest during that prior time.³ So interest was denied where the right to mesne profits was barred by failure to claim them in the time and manner fixed by law.⁴ Only simple interest at the legal rate is computed, and neither the interest nor consideration, as principal, is to be increased by the fact that it was payable by instalments at annual or any higher than the legal rate. Nor will the consideration be increased by the payment of taxes.⁵ In a late case in Iowa,⁶ an action was brought upon a promissory note, a part of the consideration of which was for land conveyed by the payee to the maker with warranty, and to which the title had failed. The failure of title was set up as a defense to so much of the note as was purchase money. The note stipulated for interest at the rate of ten per cent., the ordinary legal rate being six per cent. The plaintiff contended that the consideration for the land and interest at the ordinary legal rate was the proper measure of deduction; but the court held that it was just to abate the conventional rate as well as the principal.

EXPENSES, COSTS AND COUNSEL FEES AS DAMAGES.—The rule of damages for a total breach of the covenants in a deed of land is often stated in general terms to be the amount of the consideration money and interest. This has been done some-

¹ Jackson v. Turner, 5 Leigh, 127; Rich v. Johnson, 2 Pin. 88; Morris v. Rowan, 17 N. J. L. 304; Sumner v. Williams, 8 Mass. 162; Stewart v. Drake, 9 N. J. L. 139; Backus v. McCoy, 3 Ohio, 211; Cox v. Henry, 32 Pa. St. 18; McAlpine v. Woodruff, 11 Ohio St. 120; Clark v. Burr, 14 Ohio, 118; Fernandez v. Dunn, 19 Ga. 497; Cogswell v. Lyon, 3 J. J.

Marsh. 38. See Booker v. Bell, 3 Bibb, 173.

² Wead v. Larkin, 49 Ill. 99; Thompson v. Jones, 11 B. Mon. 365; Whitlock v. Crew, 28 Ga. 239.

³ Whitlock v. Crew, *supra*.

⁴ Wead v. Larkin, *supra*.

⁵ Blake v. Burnham, 29 Vt. 437.

⁶ Zent v. Picken, 54 Iowa, 535.

times in the absence from the case of any item of expense or costs; sometimes, in a direct contrast of this basis of recovery with that of the value at the time of eviction; and when of course other and incidental items, common to both, would not be mentioned; and in other instances, purposely to exclude any items which would extend the recovery beyond consideration and interest.¹

It is held that the grantee has the right to defend; that he is justified in making every fair effort to retain the land which he must be understood to have purchased for his own convenience and advantage; and because an equivalent in value may not be equally satisfactory.² It has been declared to be his duty to defend.³ Where, at the date of the deed, the premises are adversely possessed, and the grantee, or his assignee, suffers that adverse possession to ripen into a title by continuance until an action to recover the land is barred by the statute of limitations, he has no right of action as for a breach of the covenant of warranty; because, in such a case, the land is not lost by a paramount title existing at the date of the covenant, but by his own laches.⁴ It is, therefore, well settled by the best authorities, that in actions for breach of the covenants where there has been an eviction by suit, the plaintiff is entitled to recover damages, not only for loss of the land, usually, as we have seen, measured by the consideration paid, with interest, but also costs reasonably, and in good faith, incurred in defending the title and resisting the eviction.⁵ And it does not appear to be nec-

¹ *Crisfield v. Storr*, 36 Md. 129; *Turner v. Miller*, 42 Tex. 418; *McGarry v. Hastings*, 39 Cal. 360; *Eaton v. Lyman*, 24 Wis. 438.

² *Swett v. Patrick*, 12 Me. 9.

³ *Staats v. Ten Eyck*, 3 Cai. 111.

⁴ *Rindskoff v. Farmers' L. & T. Co.* 58 Barb. 36.

⁵ *Cushman v. Blanchard*, 2 Greenlf. 266; *Swett v. Patrick*, 12 Me. 9; *Ryerson v. Chapman*, 66 id. 557; *Drew v. Towle*, 30 N. H. 531; *Prescott v. Trueman*, 4 Mass. 627; *Delavergue v. Norris*, 7 John. 358; *Staats v. Ten Eyck*, 3 Caines, 111;

Pitcher v. Livingston, 4 John. 1; *Waldo v. Long*, 7 id. 173; *Bennett v. Jenkins*, 13 id. 50; *Funk v. Voneida*, 11 S. & R. 109; *Stanard v. Eldridge*, 16 John. 254; *Taylor v. Holter*, 1 Mont. 688; *Dalton v. Bowker*, 8 Nev. 190; *Morris v. Rowan*, 17 N. J. L. 304; *Cox v. Strode*, 2 Bibb, 273; *Robertson v. Lemon*, 2 Bush, 301; *Armstrong v. Percy*, 5 Wend. 535; *Rickert v. Snyder*, 9 id. 416; *Leffingwell v. Elliott*, 10 Pick. 204; *Kennison v. Taylor*, 18 N. H. 220; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Stuart v. Matheiser*, 23 U. C.

essary, on principle or authority, that such costs should be incurred by the grantee as a defendant in actions by the claimant of the superior title. They are equally recoverable if necessarily incurred in proper proceedings taken by the covenantee to ascertain and protect the title supposed to be conveyed, or to obtain possession of the land.¹

Q. B. 135; *Harding v. Larkin*, 41 Ill. 413; *Lot v. Parish*, 1 Litt. 393; *Lane v. Fury*, 31 Ohio St. 574; *Williamson v. Williamson*, 71 Me. 442; *Swartz v. Ballou*, 47 Iowa, 188.

¹*Pitkin v. Leavitt*, 13 Vt. 379; *Haynes v. Stevens*, 11 N. H. 28; *Kingsbury v. Smith*, 13 id. 109; *Gregg v. Richardson*, 25 Ga. 570; *White v. Williams*, 13 Tex. 258; *Yokum v. Thomas*, 15 Iowa, 67; *Lane v. Fury*, 31 Ohio St. 574; *Merritt v. Morse*, 108 Mass. 270. See *Ferrell v. Alden*, 8 Humph. 44. In *Kingsbury v. Smith*, supra, the action was brought on an implied warranty of the title in the sale of a chattel. K purchased it of C, who previously had purchased and got possession of it from S by fraud. In an action of trover by K against S, who had repossessed himself of the chattel, C was offered as a witness, and he was objected to as incompetent, on the ground of interest, being liable to K on his warranty of title for the costs incurred in that action, if the plaintiff should fail. Woods, J., after citing many cases, said: "The principle deducible from the cases cited would seem to be that the grantee, in an action upon a covenant of warranty, express as in a deed, or implied as upon a sale of personal property, is entitled to recover, as part of his damages sustained by reason of the failure of the title conveyed, the reasonable and necessary expenses incurred in a proper course of legal proceedings for the ascertainment and protection of his rights under the purchase, as

well as reasonable compensation for his trouble and expenses, to which he may have been put in extinguishment of a paramount title. And it seems to us that there can be no sound distinction between the case in which the expenses are incurred in the necessary and proper prosecution of a suit for the ascertainment and protection of the purchaser's rights, and the case of a defense for the same purpose. In the case under consideration, it would, in our view, fall little short of absurdity to hold that if the plaintiff had kept possession of the horse, and the defendant had brought suit, the plaintiff would be entitled to recover as damages, in a suit against Chandler on the implied warranty of title, the expenses of the defense, and at the same time hold that when the defendant had got possession of the horse, and the only means left the plaintiff for the ascertainment and protection of his rights is the very suit he has brought, he would not be entitled, in an action on the warranty against Chandler, to recover the expenses of the present suit properly and necessarily incurred, in the event of a failure of success, by reason of the failure of the title conveyed to him by Chandler. Such a doctrine, making such a distinction, we think cannot be sustained upon sound reason, or upon well considered decisions, which go to establish the right of recovery of the costs and expenses, as clearly, we think, in one case as in the other."

Where several suits and cross-suits have been brought, involving the title to the property conveyed, and these suits were properly and in good faith prosecuted or defended by the grantee, the costs and expenses of all have been allowed as proper damages in addition to compensation for loss of the land. This proposition is very clearly declared and maintained in a very late case in Maine,¹ in which Peters, J., delivering the opinion of the court, said: "The foundation of a claim for damages under it (the covenant of warranty) must be that an eviction, or something equivalent thereto, has properly taken place. The covenantee, who has been evicted, is entitled to have repaid to him all reasonable outlay which he in good faith expends for the assertion or defense of the title warranted to him. Weston, C. J., says: 'He (the covenantee) was justified in making every fair effort to retain the land.'² If he is assaulted with ever so many suits, he must defend them, unless it is clear that a defense would avail nothing. If he defends but one, and lets the others go by default, he might get himself into inextricable trouble. It is as essential that he should defend all the suits as well as any one of them. A defender of a walled city might as well plant all his means of defense at a single gate, and leave all the others undefended, to be entered by the enemy.

"The covenantee becomes the agent of the covenantor in making a defense against suits. He should do for his warrantor what the warrantor should do for himself, if in possession. It is no more expensive for the warrantor to defend suits brought against his agent than suits against himself, and the presumption is, that he would have been a party to the same litigations had he remained in possession. But the agent must act cautiously and reasonably. He has no right 'to inflame his own account,'³ nor indulge in mere quarrelsome cases. It follows, therefore, that the plaintiff may recover for the damages and costs and expenses of suits brought against him, and also for the costs and expenses of suits brought by him affecting the title to the estate. Each suit may have been part of the means by which the title was sought to be defeated."⁴

¹ Ryerson v. Chapman, 66 Me. 557.

³ Short v. Kalloway, 11 A. & El. 28.

² Swett v. Patrick, 12 Me. 9.

⁴ In this case of Ryerson v. Chapman, the defendant getting a sum-

Cases may occur, and have occurred, where the superior title asserted is so obviously well founded that resistance cannot be made in good faith; then the covenantee cannot defend at the expense of the covenantor.¹

It is also true that in other cases the grantee is not obliged at his peril to decide upon the title. He may defend without notice to his warrantor, and even exclude him from co-operation in defending the title,² without affecting his liability upon the covenant. And it may be doubted that the covenantor, when notified to defend, can affect his liability in respect to costs, afterwards incurred by the grantee, by silence, or direction not to defend. In a New Jersey case,³ Hornblower, C. J., pointedly said: "Suppose the defendants, conscious of the unsoundness of the title, had not only refused to defend the suit, but had given notice to the tenant that if he made any defense he must do it at his own risk and expense; would that have availed them anything? I think not. It would place a grantee in hazardous circumstances, if, upon such an intimation from his grantor, he must either defend at his own expense, or abandon the title, and look for compensation in damages under his covenants. On the contrary, I am of opinion, that notwithstanding such notice from the covenantor, the grantee would have a right to recover from him the taxable costs he had incurred in honestly and fairly resisting the claim of title set up by the plaintiff in the ejectment." In Pennsylvania the rule seems to be other-

posed title to a parcel of land by levy, conveyed it to the plaintiff by a warranty deed. The plaintiff had been in undisturbed possession for about fifteen years under his deed when his possession was invaded by one Carleton, who claimed title to the land upon the ground that the levy under which the defendant acquired the land was defective and void. The plaintiff sued Carleton, and Carleton sued the plaintiff, in actions of trespass, and several other suits followed between them. While all the suits were pending, one of them was carried up to decide the question of title to

the land, and Carleton prevailed. After this, the defendant paid to the plaintiff all the costs and counsel fees incurred in the defense of that action, and also paid him the value of the land from which he had been evicted, but refused to pay the damages, costs and expenses incurred in the other actions.

¹ Cushman v. Blanchard, 2 Greenlf. 268; Hodgins v. Hodgins, 13 U. C. C. P. 146; Drew v. Towle, 30 N. H. 531; Ryerson v. Chapman, 66 Me. 557.

² Boyle v. Edwards, 114 Mass. 373.

³ Morris v. Rowan, 17 N. J. L. 304.

wise. In a recent case, where the alleged breach of covenant was the recovery of a life estate in dower, Sharswood, J., said: "Without undertaking to lay down any general rule, it would seem to be most reasonable to hold, that where a covenantor has been notified to appear and defend, and declines or fails to do so, and the covenantee chooses to proceed and incur costs and expenses, in what it may be presumed that the covenantor considered to be an unnecessary and hopeless contest, he does so certainly upon his own responsibility."¹ In a Maryland case, the court say: "Where such notice is given, and the party notified refuses to defend the title, the covenantee, or his assignee, has the right to employ counsel for that purpose; and may recover in an action on the covenant such reasonable fees as he has been compelled to pay."²

Where there is such conflict of authority no rule can be stated that has general force as law. But recognizing that the grantee has a right to defend the title warranted to him, or to have it defended; if the covenantor declines to intervene for that purpose on request, the grantee ought to be at liberty to defend for himself; and on the principle of allowing full compensation for actual loss, if the title warranted fails, the expense and cost of defending it should fall on the party who covenanted to warrant and defend it and has broken his covenant.

After the covenantor has come into court on notice and assumed the defense, the grantee is not entitled also to employ counsel for his own protection, and charge the expense, in the event of failure of title, to the covenantor.³

As to the necessity and effect of notice to the covenantor to defend, there is considerable diversity of opinion in other respects, as will appear by the cases already referred to, and others. But as the covenant to defend is as absolute as that to warrant the title, notice would not seem to be more necessary in respect to costs and expenses, reasonably incurred in good faith, in the defense of the title, than to confer a right to be compensated for the loss of the land. In a case already mentioned, Ford, J., said: "The defendant's counsel supposes the costs on eviction

¹ *Ferry v. Drabenstadt*, 68 Pa. St. 400.

² *Crisfield v. Storr*, 36 Md. 129.

³ *Kennison v. Taylor*, 18 N. H. 220.

are allowed, because it was the warrantor's duty to defend the suit upon receiving notice of the action; and he objects to them in this case, because no notice was given to the warrantor or his representatives of the pendency of the action. But all the cases agree in allowing the costs of eviction; and it is immaterial whether he had notice or not. His covenant to defend is not a conditional one, if he has notice; otherwise a want of notice would bar the warranty itself. He covenants to defend, as absolutely as he does to warrant. The intent of notice is not to make him liable for costs; it is to make the record of eviction conclude him in respect of the title."¹ And the language in the recent case in Maine, which has already been referred to, is equally explicit in response to a like objection. The court say: "Notice was not necessary to put him in position to enforce such a liability. Without a notice the plaintiff can recover his damages caused by the failure of the title warranted to him. And, in this state, the costs of the former action, and the expenses of counsel fees attending it, whether in asserting or defending the title, are a portion of the damages recoverable. The want of notice of a suit to the warrantor, undoubtedly increases the burden of proof that falls on the warrantee. In such case he would be held to prove that the actions brought against him were reasonably defended, and that the costs were fairly and necessarily incurred. And as to the costs in cases in which the warrantee was plaintiff instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant, and whether the covenantor was notified or not, from the nature of things, the burden is on the covenantee to show such items to be reasonable and proper claims, where the grantor does not appear in the suits."² While these general principles are supported by the best authorities,³ there has been an exception in some jurisdictions of the item of counsel fees. They are not allowed in Massachusetts,⁴ and perhaps in some

¹ *Morris v. Rowan*, 17 N. J. L. 304.

² *Ryerson v. Chapman*, 66 Me. 557.

³ *Staats v. Ten Eyck*, 3 Cai. 111;

Pitcher v. Livingston, 4 John. 1;

Robertson v. Lennon, 2 Bush, 301;

Cox v. Strode, 2 Bibb, 273; *Pitkin v.*

Leavitt, 13 Vt. 379; *Kennison v.*

Taylor, 18 N. H. 220; *Lane v. Fury*,

31 Ohio St. 574; *Harding v. Larkin*,

41 Ill. 413; *Keeler v. Wood*, 30 Vt.

242.

⁴ *Leffingwell v. Elliot*, 10 Pick.

204.

other states.¹ It is difficult to perceive, however, any sound reason for this exception; for as was said in an early case in Maine,² "the plaintiff could not defend without counsel, and if employed they must be paid;" and the same reason that would authorize the recovery of the clerk's, sheriff's and other costs, would justify the recovery of reasonable counsel fees. The character of these expenses is the same; one is just as requisite as the other; and both are requisite to a defense.³

In Illinois the right of recovery is confined to costs incurred in actions in which the warrantee is a party to the record and in which he was evicted. And the rule is said to be limited to the taxable costs and reasonable attorney's fees in that suit.⁴

The covenantee is not entitled to damages on these covenants for any outlays necessitated by the existence or assertion of an invalid adverse claim. The covenant does not protect him against any but lawful claims, which negative the title that the deed to him purports to convey.⁵ Nor can the covenantee or his assignee recover for any damages resulting from his own wrongful acts;⁶ as where the breach of the covenant consists in a third person having a right of way over a stair-case in the tenement conveyed with warranty, and the plaintiff seeks to recover damages which he has been compelled to pay to such third person for removing the stair-case.⁷ In such a case there was a covenant of warranty and against incumbrances. The plaintiff was held entitled to recover damages for the incumbrance only to the date of the removal of the stair-case; and nothing for the damages which he had been adjudged to pay for tearing down the stair-case, though that act extinguished the incumbrance.⁸ Where an equitable title is conveyed with covenants, and the party having the legal title asserts it in such manner as amounts to an eviction, expenses incurred to procure that title by a suit in equity have been allowed on the same principle; as where the title undertaken to be conveyed has no

¹ White v. Clack, 2 Swan. 230.

See Holmes v. Sennickson, 15 N. J. L. 313.

² Sweet v. Patrick, 12 Me. 9.

³ Taylor v. Holter, 1 Mont. 688.

⁴ Harding v. Larkin, 41 Ill. 413.

⁵ Christie v. Ogle, 33 Ill. 295.

⁶ Wilcox v. Danforth, 5 Bradw. 378.

⁷ Id.

⁸ Id.

equitable or legal foundation, and the paramount title has been procured by the covenantee by purchase. This was held in a very recent case in Ohio.¹ A married woman sold real estate, but the acknowledgment of the deed was so defective that the title did not pass. Her heirs, having set up title to the lands, and brought suit for possession, against one to whom the purchaser had conveyed with the covenants, a proceeding in chancery was successfully prosecuted to a decree for the correction of that defective conveyance, and the suit for possession was defeated by seasonably obtaining that decree. For the expenses incurred in curing that defect, an action was brought on the covenant of warranty. The court held that it was not necessary that the paramount title should be established by judgment or decree. And if, under the circumstances existing when the petition to reform was filed, the plaintiff might have bought in the paramount title, and recovered of the covenantor any reasonable amount paid therefor, he might recover from such covenantor the costs and expenses, including counsel fees, in both suits; that, looking to the substance as well as the form of the transaction, it was a mode of getting in the legal title. But in a similar case in Iowa,² the costs were denied because the suit in equity was brought without a previous request to the covenantor to obtain the legal title.

SECTION 5.

COVENANT AGAINST INCUMBRANCES.

What are incumbrances — A covenant in presenti — The rule of damages — The Canadian and English rule of damages — In some of the states the covenant runs with the land — Criticism of the rule of damages — Rule of damages where the incumbrance is permanent or cannot be removed — Where the covenant is connected with that for quiet enjoyment — Covenant to pay off incumbrance.

WHAT ARE INCUMBRANCES.— An incumbrance has been defined to be every right to or interest in the land, which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.³

¹ Lane v. Fury, 31 Ohio St. 574.

Trueman, 4 Mass. 627; Barlow v.

² Yokum v. Thomas, 1 Iowa, 675.

McKinley, 24 Iowa, 69; Mitchell v.

³ 2 Greenlf. Ev. § 242; Prescott v.

Warner, 5 Conn. 497; Stambaugh

The cases reported show a great variety of incumbrances; but they may be grouped or classified, for the present purpose, as incumbrances which consist: 1. Of a judgment, mortgage or some debt or charge that is a lien on the land conveyed. 2. Some right in a third person, which may be absolutely or contingently asserted to the title, possession or use of the land conveyed, or some part of it; or some privilege or easement thereon; or which imposes in the future some duty or restriction upon the grantee in respect to it.¹

v. Smith, 23 Ohio St. 584; *Carter v. Denman*, 23 N. J. L. 273; *Rawle on Cov. T.* 94-95.

¹ Mr. Rawle, in his admirable work on *Covenants for Title* (4th ed. pp. 96-97), thus enumerates what have been held to be incumbrances, the existence of which would be a breach of a covenant that the land conveyed is free from incumbrance: "Thus, there can be no doubt that the covenant is broken by the existence of a judgment, a mortgage, or any debt which is a lien upon the land conveyed (*Bean v. Mayo*, 5 Greenlf. 94; *Shearer v. Ranger*, 22 Pick. 447; *Norton v. Babcock*, 2 Met. 510; *Jones v. Davis*, 24 Wis. 229; *Case v. Erwin*, 18 Mich. 434); a right of dower, whether inchoate or consummate by the death of the husband (*Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Porter v. Noyes*, 2 Greenlf. 26; *Donnell v. Thompson*, 10 Me. 170; *Smith v. Connell*, 32 Me. 126; *Blanchard v. Blanchard*, 48 Me. 177; *Runnells v. Webber*, 59 Me. 488; *Russell v. Perry*, 49 N. H. 547; *Carter v. Denman*, 23 N. J. L. 273; *Jeter v. Glenn*, 9 Rich. L. 376; *Henderson v. Henderson*, 13 Mo. 151; *Hatcher v. Andrews*, 5 Bush, 561; *McAlpin v. Woodruff*, 11 Ohio St. 120; contra dicta, *Powell v. Monson Co.* 3 Mason, 355); or by the existence of taxes, whether presently due (*Almy v.*

Hunt, 48 Ill. 45; *Ingalls v. Cooke*, 21 Iowa, 560; *Mitchell v. Pillsbury*, 5 Wis. 407); or which, when thereafter levied, relate back prior to the conveyance (*Hutchins v. Moody*, 30 Vt. 655; S. C. 34 id. 433. See *Pierce v. Brew*, 43 Vt. 292; *Randell v. Lakey*, 40 N. Y. 513; *Overstreet v. Dobson*, 28 Ind. 256; *Blossom v. Van Court*, 34 Mo. 394; *Peters v. Myers*, 22 Wis. 602; *Long v. Moler*, 5 Ohio St. 271; and see also *Cochran v. Gould*, 106 Mass. 29; *Carr v. Dooley*, 119 Mass. 294; *Blackie v. Hudson*, 117 Mass. 181; *Langsdale v. Nicklaus*, 38 Ind. 289); but obviously not taxes which, assessed after the execution of the deed, do not so relate back. *Jackson v. Sassaman*, 29 Pa. St. 106. So where a testator devised to his daughter the right of living in part of a house, of which the whole was afterwards sold by the residuary devisee, such paramount right was held to be a breach of the covenant against incumbrances made by the latter. *Jarvis v. Buttrick*, 1 Met. 480. So when the premises were sold subject to a covenant that no ardent spirits should be sold therefrom (*Hatcher v. Andrews*, 5 Bush, 561); or to a covenant that a certain fence should be erected or maintained (*Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276. See *Parish v. Whitney*, 3 Gray, 516; *Blain v. Taylor*, 19 Abb.

A COVENANT IN PRESENTI.—The American covenant against incumbrances, in general use, is a covenant *in presenti*, that the premises conveyed *are* free and clear of all incumbrances. It is generally treated as a personal covenant, not running with the land, and broken, if at all, the moment it is made; that it is thereby turned into a chose in action in the covenantee, and therefore incapable of transmission to his grantee by deed of the premises.¹

THE RULE OF DAMAGES.—Being regarded as a covenant of indemnity, the mere existence of an incumbrance of the first class above mentioned is not ordinarily an actual injury, in the absence of anything done to enforce, or of anything paid by the covenantee to satisfy or extinguish it. In such cases, for the mere technical breach, nominal damages may be recovered, and no more. This was so decided at an early day in New York;²

Pr. 228); or to a restriction against building except in a particular way. *Roberts v. Levy*, 3 Abb. Pr. N. S. 311. All these have been held to be breaches of the covenant." And on p. 100, the author says: "Again, it has been said that the covenant is broken by the existence of any easements or servitudes to which the land is subject. *Mitchell v. Warner*, 5 Conn. 508. And as a general proposition this may be also true. Thus, the existence of a paramount private right of way. *Wilson v. Cochran*, 46 Pa. St. 233; *Russ v. Steele*, 40 Vt. 310; *Blake v. Everett*, 1 Allen, 250; *Weatherbee v. Bennett*, 2 Allen, 428. Or, it has been held, of a right of way for a railroad. *Barlow v. McKinley*, 24 Iowa, 70; *Beach v. Miller*, 51 Ill. 206. See also *Bark v. Hill*, 48 Ind. 52; *Purcell v. Hannibal*, etc. R. R. Co. 50 Mo. 504. A right to cut and maintain a drain. *Smith v. Sprague*, 40 Vt. 43. Or other artificial water course. *Prescott v. White*, 21 Pick. 341. A right to cut timber or 'wood leave,' as it

is sometimes called. *Cathcart v. Bowman*, 5 Pa. St. 319; *Spurr v. Andrew*, 6 Allen, 420. And, in some cases, it is said, by the right to dam up and use the water of a stream running through the land conveyed. *Morgan v. Smith*, 11 Ill. 194; *Ginn v. Hancock*, 31 Me. 42. All these have been held to be incumbrances within the scope of the covenant."

So is a right of way over a staircase in a tenement conveyed. *Wilcox v. Danforth*, 5 Bradw. 378.

¹ *Andrews v. Davison*, 17 N. H. 413; *Mills v. Saunders*, 4 Neb. 190; *Bean v. Mayo*, 5 Greenlf. 94; *Eaton v. Lyman*, 30 Wis. 41; *Pillsbury v. Mitchell*, 5 id. 17; *Delavergne v. Norris*, 7 John. 358; *Hall v. Dean*, 13 id. 105; *De Forrest v. Leet*, 16 id. 122; *Stanard v. Eldredge*, id. 254; *Prescott v. Trueman*, 4 Mass. 627; *Wyman v. Ballard*, 12 id. 304; *Galison v. Sandford*, 12 N. J. L. 261; *Brooks v. Moody*, 25 Ark. 452; *Stewart v. Drake*, 9 N. J. L. 139.

² *Delavergne v. Norris*, 7 John. 358.

the court saying: "If he (the covenantee) has not extinguished, but it is still an outstanding incumbrance, his damages are but nominal; for he ought not to recover the value of the incumbrance, on a contingency, where he may never be disturbed by it. This is the reasonable rule; for if he was to recover the value of an outstanding mortgage, the mortgagee might still resort to the mortgagor on his personal obligation, and compel him to pay it; and if the purchaser feels the inconvenience of the existing incumbrance, and the hazard until he is evicted, he may go and satisfy the mortgage, and then resort to his covenant." This is the settled American rule.¹

Nominal damages may be recovered though the covenantor has not satisfied the incumbrance before action is brought on the covenant.² There may be actual injury from the mere existence of a mortgage; and whenever it is actually injurious the covenant affords an indemnity. In a Pennsylvania case, the existence of a paramount mortgage having ten years to run gave cause to the creditors of the covenantee to press their demands; he made an assignment, and on a supposition of a sale of the premises to which the covenant related, Duncan, J., said: "The grantee ought to recover all the actual damages he has sustained by the grantor's violation of his covenant, be-

¹ *Tufts v. Adams*, 8 Pick. 547; *Harlow v. Thomas*, 15 id. 66; *Wyman v. Ballard*, 12 Mass. 304; *Prescott v. Trueman*, 4 id. 627; *Johnson v. Collins*, 116 id. 392; *Clark v. Swift*, 3 Met. 390; *Brooks v. Moody*, 20 Pick. 474; *Thayer v. Clemence*, 22 id. 490; *Jenkins v. Hopkins*, 8 id. 346; *Richardson v. Dorr*, 5 Vt. 9; *Andrews v. Davison*, 17 N. H. 413; *Osgood v. Osgood*, 39 id. 209; *Willson v. Willson*, 25 id. 235; *Smith v. Jefts*, 44 id. 482; *Eaton v. Lyman*, 30 Wis. 41; *Pillsbury v. Mitchell*, 5 id. 17; *Eddington v. Nix*, 49 Mo. 134; *St. Louis v. Bissell*, 46 id. 157; *Bean v. Mayo*, 5 Greenlf. 94; *Randell v. Mallett*, 14 Me. 51; *Herrick v. Moore*, 19 id. 313; *Clark v. Perry*, 30 id. 151; *Reed v. Pierce*, 36 id. 455; *Runnells v. Webber*, 59 id. 488; *Mills v.*

Saunders, 4 Neb. 190; *Garrison v. Sandford*, 12 N. J. L. 261; *Stewart v. Drake*, 9 id. 141; *Funk v. Voneida*, 11 S. & R. 109; *Patterson v. Stewart*, 6 W. & S. 528; *Pitcher v. Livingston*, 4 John. 1; *Hall v. Dean*, 13 id. 105; *Stanard v. Eldredge*, 16 id. 254; *Baldwin v. Munn*, 2 Wend. 405; *Trueman v. Bingham*, 26 N. Y. 483; *Foote v. Burnet*, 10 Ohio, 317; *Whistler v. Hicks*, 5 Blackf. 102; *Smith v. Ackerman*, id. 541; *Pomerooy v. Burnett*, 8 id. 142; *Brady v. Spruck*, 27 Ill. 478; *Willeys v. Burgess*, 34 id. 500; *Richard v. Bent*, 59 id. 38; *Cheney v. City National Bank*, 77 id. 562; *Davis v. Lyman*, 6 Conn. 255; 4 Kent's Com. 471-2; 2 Wash. R. P. 649; *Funk v. Creswell*, 5 Iowa, 62.

² *Smith v. Jefts*, 44 N. H. 482.

cause the very sale is the consequence of the incumbrance. If there is a judgment against him for the smallest sum, insufficient to condemn his land, by taking in the mortgage, which is a reprisal, if due within seven years, his land is condemned, and sold by means of this very incumbrance; sold for less, *minus* the mortgage money. Is not this an actual damnification to this amount, occasioned by the breach of covenant? If it was a judgment with a stay of execution, and the land sold on a judgment against the grantee, and the judgment against the grantor paid out of the proceeds of the sale, this is a damnification. So here, by the operation of law, a consequential damage arises from the delinquency of the grantor; in reality the plaintiff has sustained every possible damage he can sustain—he can never suffer more. It is the same thing to him as if the land had been sold on the mortgage given by the grantor. The equity of this case is to award to the plaintiff the fair present value of the mortgage.”¹

In *Braman v. Bingham*,² the grantor covenanted that the premises were subject to no incumbrances except mortgages to the amount of \$12,400, and in fact there were mortgages to the amount of \$12,800. The grantee having paid one of them exceeding \$400, was held entitled to recover that sum with interest, without paying off the remaining incumbrances, and that he was not confined to nominal damages. The court say, by Selden, J., that “the existence of \$400 of incumbrances in excess of the amount named in the covenant, constituted a breach of the covenant, and entitled the plaintiff to nominal damages without having made any payment. Such covenant is broken as soon as made, if ever. When the plaintiff paid the excess of \$400 he became entitled to recover that amount as damages for the breach. By the terms of the covenant it appears to have been contemplated that the lands were to remain, for a time at least, subject to the lien of \$12,400. And it would not be reasonable to require the grantee to pay that sum, as well as the excess, to entitle him to a substantial indemnity for the conceded breach of the defendant’s covenant.”

If the covenantee pays off or procures a discharge of the

¹ *Funk v. Voneida*, 11 S. & R. 109. ² 26 N. Y. 483.

incumbrance, the amount that he fairly and necessarily pays for that purpose, not exceeding, however, the purchase money, and interest from the time of payment, will be the measure of damages, and may be recovered though such payments may have been made after suit brought on the covenant.¹ The legal ground of action is not a debt or obligation to pay money, but the breach of the defendant's covenant. There being such a breach before the action is commenced, it is maintainable for some damages, and any actual loss which results from that breach, down to the assessment of damages, may be included.²

The covenantee is not obliged to pay off the incumbrance, and if it is suffered to ripen into a title adverse and indefeasible, the measure of damages, on eviction, will be the same as upon a covenant of warranty,⁴ and perhaps without actual eviction.³ It has been held in Iowa that a purchaser who receives a deed

¹Kent v. Cantrall, 44 Ind. 452; Rardin v. Walpole, 38 id. 146; Farnum v. Peterson, 111 Mass. 148; Foote v. Burnet, 10 Ohio, 317; Stambaugh v. Smith, 23 Ohio St. 584; Hall v. Dean, 13 John. 105; Comings v. Little, 24 Pick. 266; Norton v. Babcock, 2 Met. 516; Garrison v. Sandford, 12 N. J. L. 261; Stoddard v. Gage, 41 Me. 287; Brooks v. Moody, 20 Pick. 474; Harlow v. Thomas, 15 id. 66; Thayer v. Clemence, 22 id. 490; Willson v. Willson, 25 N. H. 229; Grant v. Tallman, 20 N. Y. 191; Chapel v. Bull, 17 Mass. 213; Spring v. Chase, 22 Me. 505; Reed v. Pierce, 36 id. 455; Davis v. Lyman, 6 Conn. 255; Wyman v. Bridgen, 4 Mass. 150; Wyman v. Ballard, 12 id. 304; Tufts v. Adams, 8 Pick. 547; Batchelder v. Sturgis, 3 Cush. 205; Waldo v. Long, 7 John. 173; Delavergne v. Norris, id. 358; Hall v. Dean, 13 id. 105; Stanard v. Eldridge, 16 id. 254; Baldwin v. Munn, 2 Wend. 405; Stewart v. Drake, 9 N. J. L. 139; Funk v. Voneida, 11 S. & R. 112; Brown v. Brodhead, 3 Whart. 104;

Henderson v. Henderson, 13 Mo. 151; St. Louis v. Bissell, 46 id. 160; Snyder v. Lane, 10 Ind. 424; Hurd v. Hall, 12 Wis. 112; Bailey v. Scott, 13 id. 618; Eaton v. Tallmage, 22 id. 502; McGary v. Hastings, 39 Cal. 360; Bark v. Clements, 16 Ind. 132; Brandt v. Foster, 5 Iowa, 287; Baker v. Corbett, 28 id. 320. See Connell v. Boulton, 25 U. C. Q. B. 441.

²Brooks v. Moody, 20 Pick. 474; Leffingwell v. Elliott, 10 id. 204; Wetmore v. Green, 11 id. 462; Morrison v. Underwood, 20 N. H. 369; Miller v. Hartford, etc. Ore Co. 41 Conn. 112; Moseley v. Hunter, 15 Mo. 322; Kelly v. Low, 19 Me. 244; Stambaugh v. Smith, 23 Ohio St. 584.

³Stewart v. Drake, 9 N. J. L. 139; Jenkins v. Hopkins, 8 Pick. 346; Norton v. Babcock, 2 Met. 510; Dimmick v. Lockwood, 10 Wend. 142; Patterson v. Stewart, 6 W. & Serg. 527; Chapel v. Bull, 17 Mass. 213; Monahan v. Smith, 19 Ohio St. 384; Smith v. Dixon, 27 id. 471.

⁴Nichol v. Alexander, 28 Wis. 118.

containing a covenant against incumbrances from one who derives title by foreclosure of a senior mortgage, but without the junior mortgagee having been made a party to the foreclosure proceedings, may buy in the junior mortgage, if the premises are of such value that he can better afford to pay the amount which it costs and retain them than suffer a redemption and eviction, and should be allowed to recover on the covenant against incumbrances the amount so fairly paid, notwithstanding he received and retained an interest paramount to the incumbrance, of greater value than the amount which he paid for that interest;¹ for purchasers have a right to the benefit of their purchases, and not simply to a return of their money and interest.² Referring to this case, in which this doctrine was announced,³ the court, in *Guthrie v. Russell*, say: "This court ignored the doctrine that the consideration paid is to be taken as the value of the property as between the parties. In that case the court aimed to give full compensation, thus following, to some extent, the rule adopted in Massachusetts and some other states, where the limit of recovery in an action for the breach of the covenant is the actual value of the property at the time of the eviction, or at the time of extinguishing the incumbrance. Yet we cannot think that the court designed to depart altogether from the other rule above set forth, which is in accordance with the decided weight of authority, and which is expressly held by this court in *Brandt v. Foster*.⁴ We have no doubt that if . . . the incumbrance paid off had exceeded the purchase money and interest, the plaintiff would have been limited in his recovery to that amount."

THE CANADIAN AND ENGLISH RULE OF DAMAGES.—In Canada, the covenant against incumbrances has been construed and enforced to give substantial damages for the mere existence of incumbrances; as the covenant of seizin is generally in the United States; except that instead of following the analogy of allowing the consideration and interest for want of title, the amount of the incumbrance was held in the queen's bench to be the measure of damages, without regard to whether it is more

¹ *Guthrie v. Russell*, 46 Iowa, 269.

³ *Id.*

² *Knadler v. Sharp*, 36 Iowa, 232.

⁴ 5 Iowa, 295.

or less than the purchase money.¹ The covenant is there held to run with the land, although the grantor was in fact seized only of an equity of redemption; that it can be sued upon as such by the grantee; and the common pleas held that the measure of damages was the difference between the value of the equity of redemption and the indefeasible estate of inheritance contracted and paid for, that difference being represented by the amount for which the mortgage stands as security.²

¹ *Connell v. Bolton*, 24 U. C. Q. B. 444.

² *Empire Gold M. Co. v. Jones*, 19 U. C. C. P. 245. A very interesting and instructive opinion on this point was given in this case. The court say: "Upon the question of damages, *Hackett v. Boulton*, 8 C. P. 407, is an express authority that substantial damages are recoverable. *Carlisle v. Orde*, 7 C. P. 456, although there was a bond of indemnity sued upon as well as a covenant, shows, I think, the opinion of *Draper, C. J.*, to have been that substantial damages are recoverable upon the covenant under the circumstances appearing here. The only difference between *Connell v. Boulton*, 25 U. C. 444, and this case, is that the mortgage was due. It is an authority, also, that substantial damages are recoverable. *Raymond v. Cooper*, 8 C. P. 388, and *Carr v. Roberts*, 5 B. & Ad. 78, were cases of bond of indemnity. *Lithbridge v. Mytton*, 2 B. & Ad. 772, was a case of a covenant of indemnity, and to pay off a mortgage within a year. Ten years elapsed without its having been paid, and although the mortgage never was enforced, on an action being brought on the covenant, the covenantee was held entitled to recover the full amount of the mortgage, although no damages whatever, further than what consists in its mere existence, had been sus-

tained by him. In *Graham v. Baker*, 10 C. P. 426, and *Snider v. Snider*, 13 C. P. 157, the breaches consisted in a simple naked negation of title, and the parties had possession, and no damage by reason of the existence of any incumbrance was stated or suggested. It was treated that the defect of title might have been cured by lapse of time, so that these cases cannot affect the present. There are, however, observations in *Kennedy v. Solomon*, 14 Q. B. at p. 628, in the judgment of the late chief justice, Sir John Robinson, which give some countenance to the contention of the defendant, that nominal damages only are recoverable here. The observations alluded to are not upon the point upon which the judgment was given, for the judgment was upon the covenant for quiet enjoyment. They related to the covenants for seizin and for good title. There is also a difference between the covenant for right to convey there and here; for here the covenant is specially directed to a right to convey free from incumbrances, so as to assimilate it to a covenant that the premises are free from incumbrances. Moreover, the learned chief justice does not express a decided opinion, but a doubt only. . . . He says a mortgage or payment is treated in equity not as matter affecting the title or right to convey, because they hold that

IN SOME STATES THE COVENANT RUNS WITH THE LAND.—In several of the states this covenant is held to run with the land for the protection of the owner, who suffers actual injury from

the mortgagor or the judgment debtor is, nevertheless, the owner of the estate, and entitled to convey, subject, of course, to the incumbrance. In *Townsend v. Champernoun*, 1 Y. & J. 449, the court said that in practice, in the master's office, a mortgage, even though it may be to secure a sum larger than the value of the property, is always treated and considered as matter of conveyance, and not of objection to the title; and I find no authority for holding that it is otherwise regarded at law, though I do not feel confident that when a mortgage in fee has been given by the vendor, before giving the conveyance in which he covenants for title, and where the mortgage money has not been paid, an action might not lie on the covenant for title, and nominal damages be recovered, though the vendee had never been molested by any claim under the mortgage while it was unsatisfied. Now, on a bill for specific performance in equity, the reference to the master is to inquire and report whether a good title *can* be made, and when first shown. It is shown by an abstract which must show all the incumbrances; and the abstract is held to be complete, and a good title shown, whenever it appears that upon certain acts being done the legal and equitable estate will be in the purchaser; consequently, the appearance of incumbrances on the abstract is no reason why the master should report that a good title cannot be made; nor do they afford sufficient grounds of exception to his report that a good title can be made; for the court being in possession of what the incum-

brances are, before the conveyances come to be made, can and does cause them to be removed, and gives the purchaser ample protection against them. This is the extent of the rule in equity, and the like rule prevails at law, in executory contracts, where the contract points to the showing the title, and not to the perfecting it in the purchaser, by the conveyance. *Savory v. Underwood*, 23 L. J. Q. B. 141. But the rule, I apprehend, does not, and indeed cannot, have any application to executed contracts. The court of chancery treats the mortgage as an incumbrance, and causes it to be removed, or makes ample provision for the protection of the purchaser against it; acting upon the principle that the court will not—inasmuch as everything it does is done with a view of perfection—cause conveyances to be executed containing a covenant, which when executed would, *eo instanti*, give the purchaser an action at law to recover damages in respect to these same incumbrances. True it is that in equity the mortgagor is in a sense deemed to be the owner of the estate, and the mortgage only a pledge and an incumbrance. Treating it as an incumbrance presently existing is sufficient for the purpose of this action; but it is to be added that at law, the mortgagee in fee is regarded in quite a different light. He is seized of the estate; and that being so, the mortgagor *cannot* be. When he then assumes to convey in fee simple, absolute, and covenants for seizin and for good title simply, the rule prevailing in equity, upon references to the master on bills for

the incumbrance. It is there held, that the covenantee may recover nominal damages for the technical breach which happens at the moment of executing the deed containing the cove-

specific performance, can furnish no rule for fixing the measure of damages sustained by reason of the breach of that covenant, short of the protection given by the court of chancery itself, when the conveyance came to be executed; namely, full protection and indemnity against the incumbrance.

“In *Howell v. Richards*, 11 East, 642, Lord Ellenborough says: ‘The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz.: in this case an indefeasible estate in the fee simple.’ Now, if he executes a deed purporting to convey such an estate, when he, in fact, has only an equity of redemption, the legal estate being in a mortgage in fee, and covenants that he has such an estate, how can it be said that this covenant is not substantially broken? And, if substantially broken, that is, not merely technically, but in substance, how can it be said that the purchaser should be restricted to the recovery of nominal damages only. *Vane v. Lord Barnard*, Gilb. Eq. R. 7, before Lord Chancellor Cowper, has been referred to; but that, in my judgment, rightly understood, is a strong case in support of substantial damages in this case. Lord Barnard, on the marriage of his son, entered into articles with trustees, whereby he covenanted to settle certain lands to the usual limitations of marriage settlements; and he covenanted, ‘that, in such settlement, there shall be covenants that he is seized in fee, has good right to convey, and that the trustees shall enjoy

free from incumbrances.’ It happened that these lands were charged by Lord Barnard’s own marriage settlement, with £6,500, to be paid to such ‘daughter, or daughters, as should be living at his death, and not provided for.’ A bill was filed against Lord B. for a specific performance of the covenant in his son’s articles by Lord B.’s paying off, or otherwise giving collateral security against the contingent portion of £6,500. All parties had notice of this charge when Lord B.’s covenant was given. The lord chancellor refused this relief, saying: ‘Lord Barnard has not covenanted that the lands are free from incumbrances, but only that, in the settlement, he would give specific covenants. Notice or no notice was very material in this case, for, where a covenant is in this manner, if any incumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, that incumbrance shall be discharged, even before the sealing of the deed of settlement, because it would be needless to enter into a covenant, which, before entering into, is already known to be broken. Now, when you have notice of an incumbrance, before executing the articles, you consent with your eyes open to accept the party’s covenant against incumbrances you were aware of; and when you have chosen your own security this court will give no other security than by the articles are agreed to, and the rather in this case for that the portion is not a certain incumbrance, but a contingent one. It is strongly

nant, in consequence of the mere existence of the incumbrance; yet, that this does not arrest the covenant, and merge it in a chose in action; that a judgment for such nominal damages

urged by Mr. Vernon that, supposing these articles were but a covenant *to covenant*, yet as soon as the articles were performed by sealing the deed of settlement, then they might on that day file a bill to enforce specific performance of the covenant. The lord chancellor said in this case they would not, 'for the incumbrance was not necessary, but contingent;' and if you brought an action at law upon such a covenant, you could not recover two pence, until *breach*, which, possibly, *may never happen*; so relief was refused against this contingent covenant, but was granted in respect of another charge which was present and not contingent.' The reporter adds: 'It seems the portion, being *contingent*, and *not certain*, because it is plain by the latter part of the decree, where the incumbrance was certain, viz.: the payment of a yearly sum, and Lord Barnard was decreed immediately to discharge it, though, by the articles, he did but covenant to covenant;' and the reporter concludes: 'Note the difference between a present covenant that the lands are free from incumbrance, and that a man shall execute a deed with covenant that the lands are free, and between a covenant that lands are free, and that the trustee shall enjoy the land free.'

"The portion in this case, it is to be observed, in respect of which the relief was refused, and to which the lord chancellor referred when he said an action at law would not lie, was not a present incumbrance. It had nothing of the character of a '*debitum in presenti solvendum in*

futuro.' It depended upon two contingencies whether it would ever become an incumbrance; namely, Lord Barnard leaving a daughter him surviving, and her not being provided for. The contingency referred to was not whether, admitting the charge to be a present incumbrance, it might or not ever be enforced to the damage of the covenantee; but whether it ever should become a present incumbrance. That this was the view of the lord chancellor is apparent from his decreeing indemnity against the charge which was payable annually, and which was not, therefore, as yet payable, although by possibility it might never be enforced, to the damage of the covenantee. That was a present incumbrance, *debitum in presenti solvendum in futuro*; therefore it was deemed to be discharged. The portion, on the contrary, was somewhat of the character of an inchoate right of dower, which is not a present charge on the estate, and for which no action lies [see ante, p. 309, note]. Here the mortgage is a present incumbrance, and the covenant broken, so that Vane v. Lord Barnard is an authority that substantial damages are recoverable here. But the case of Lock v. Furze, 19 C. B. N. S. 119; and in the exchequer chamber, L. R. 1 C. P. 441, conclusively places the principle for estimating the measure of damages upon a sound, firm and rational basis; namely, that there is no difference in this respect between a contract entered into on the sale of real property, and on the sale of chattels. The true measure of damages in both cases is the difference

does not operate as a bar to a fresh suit in favor of the covenantee, or even a remote grantee, when, in the time, or during the ownership of either, a substantial injury is sustained; and

between the value of the thing as it is, and as it was warranted to be. The old case of *Gray v. Briscoe, Noy*, 142, is reaffirmed, where the covenant was that the covenantor was seized of Blackacre in fee simple, when in truth it was copyhold land. The court held the covenant to be broken; and that the plaintiff should recover damages according to the rate that the country values fee simple more than copyhold. The rule as now settled by *Lock v. Furze*, after a review of all the cases, I take to be this: that as affecting contracts relating to realty in the case of executory contracts, upon the vendor failing to establish a good title, the vendee shall recover his deposit, if any, and interest, and such reasonable expenses as he has incurred in investigating the title; and in case he has entered into possession, in pursuance of the contract, then perhaps such further sum as he may have reasonably expended on the property in the expectation of the contract being fulfilled. In case the contract has been executed, but no title has passed at all, then on a covenant for seizin, or good right to convey, he shall recover back his principal and interest and expenses. But in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that estate which has passed and that which the deed purported to convey, and which the grantor covenanted that he had a right to convey. Now to apply this to the present case. The deed purported to convey an indefeasible estate of inheritance in fee

simple, free from incumbrance done or knowingly suffered by the grantor. All that the grantees have in truth obtained is an equity of redemption which is subject to a mortgage which constitutes a present incumbrance, although the moneys secured thereby are payable at future periods. The covenant is broken; the plaintiffs, therefore, have a right to recover in damages the difference between the value of the equity of redemption, which they have got, and the indefeasible estate of inheritance which they contracted for and paid for. That difference is represented by the amount for which the mortgage stands as a security, and neither more nor less. A case might no doubt arise, as where the amount secured by the mortgage is made payable at a remote period, and either without interest, or at a low rate of interest, in which it might be necessary to make a deduction equivalent to the difference between the value of a present payment of the principal, and payment at the deferred period; but in this case there arises no question of that kind." See *Mayne on Damages*, 2d ed. 149. This author favors the same view. He says: "There seems to be no difference in principle between a covenant against incumbrances, and a covenant to pay them off. If so, the point is decided in England," referring to *Lithbridge v. Mytton*, 2 B. & Ad. 772. He continues: "I conceive that the rule laid down by the court of king's bench is the true one. The damages are not, as Mr. Sedgwick seems to suppose, given in respect to a future contingent loss.

that for such injury recovery may be had, limited, *in maximum*, only as is the recovery upon the other covenants.¹ This is substantially the rule in Ohio, Indiana, Illinois, Wisconsin, Missouri and South Carolina. In most of these states, the rule in respect to this covenant is the same that is applied in actions for breach of the covenant of seizin. They are treated as covenants of indemnity against actual damage, arising in the one case from the want of lawful title, and in the other from the assertion of a paramount incumbrance; that they run with the land until such damage has actually arisen.²

In *Post v. Campau*,³ Cooley, J., said: "If all incumbrances were of the same nature, and might be got rid of at the pleasure of the owner of the property incumbered, there would be no difficulty and no wrong in applying to all the same rule. But anything is an incumbrance which constitutes a burden upon the title: a right of way;⁴ a condition which may work a forfeiture of the estate;⁵ a right to take off timber;⁶ a right

They are the proper compensation for an actual and existing loss. The question is: How much is the value of the estate diminished at the moment by the existence of the incumbrances? If interest has to be paid upon them, there is a clear loss of annual profit; but suppose the interest is provided for elsewhere, and the estate is merely an ultimate security, still the owner is damnified to the full amount of the incumbrances, if he should wish to sell the estate, to mortgage it, or to charge portions upon it. True, he may not want to do any of these things at present, but as soon as he does want to do them, he will undoubtedly fail. It is no satisfaction to a man who has to break off a match, for instance, because he cannot effect a settlement, to be told that he may now bring an action, and obtain substantial damages. Nor is it any answer to say that he may himself pay off the incumbrance, and then

sue; because very likely he may have no ready money, and be unable to borrow any, on account of the incumbered condition of his estate; in short, the American doctrine converts a covenant to pay off incumbrances into a covenant of indemnity against incumbrances, which it is apprehended is a very different thing."

¹ *Eaton v. Lyman*, 30 Wis. 41; *Mecklem v. Blake*, 22 id. 495; *Pillsbury v. Mitchell*, 5 id. 17; *Dickson v. Desire*, 23 Mo. 151; *Foote v. Burnett*, 10 Ohio, 317; *Backus v. McCoy*, 3 id. 211; *Devere v. Sunderland*, 17 Ohio, 60; *Overheiser v. McCallister*, 10 Ind. 41; *McCready v. Brisbane*, 1 Nott. & McC. 104; *Jeter v. Glenn*, 9 Rich. 376; *Richard v. Bent*, 59 Ill. 38.

² *Mecklem v. Blake*, 22 Wis. 495.

³ 42 Mich. 90.

⁴ *Clark v. Swift*, 3 Met. 390.

⁵ *Jenks v. Ward*, 4 Met. 412.

⁶ *Cathcart v. Bowman*, 5 Pa. St. 317.

of dower, whether assigned or unassigned.¹ In short, every right or interest in the land, to the diminution of the land, but consistent with the passage of the fee by the conveyance.² Some of these are permanent in their nature, and incapable of being removed at the option of the covenantee. They permanently reduce the value of the title conveyed, and this as much at the time of the conveyance as at any future time; and it is therefore reasonable to hold that the covenant against them is broken at once and finally. The covenantee may at once proceed to recover full damages. But when the covenant consists of a money charge, capable of being removed at some time, but which has, as yet, caused no loss to the covenantee, the doctrine that because the promise of the covenant is technically broken by the existence of the incumbrances [substantial damages may be recovered], must often in its application prove a denial of justice. A covenant may be said to run with the land when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land when its whole force is giving assurance against something which immediately affects the title and causes present damage. Tested by this rule, a covenant against an incumbrance, which consists in a right of way, would not run with the land; but a covenant against a money charge must attach itself to the title conveyed, and accompany it, not only for the protection of the covenantee, but for the protection of any of his assigns, whom the incumbrance may eventually damnify.³ It is only by thus distinguishing between incumbrances, that the incumbrance can have reasonable effect in all cases, and, when the courts thus discriminate, there is no difficulty in giving substantial redress under definite and inflexible rules of law. When the law can be just and also certain, there is no reason why an unjust certainty should be perpetuated. I am of opinion that the better and only just rule is that a right of action accrues when substantial damage is suffered, and that there may be successive breaches when, by suc-

¹ *Runnells v. Webber*, 59 Me. 488.

³ *Foote v. Burnett*, 10 Ohio, 332;

² *Prescott v. Trueman*, 4 Mass. 627,
630.

Knadler v. Sharp, 36 Iowa, 232;
Richard v. Bent, 59 Ill. 38.

cessive acts or occurrences, damage is from time to time suffered as a consequence of the incumbrance."

In Ohio, no action is maintainable for a mere technical breach of the covenant of seizin.¹ But it is there held that the covenant against incumbrances is broken as soon as made, if an incumbrance in fact exists; and a right of action thereon immediately accrues to the covenantee, at least for nominal damages. In such action, however, more than nominal damages cannot be recovered, unless the covenantee has removed the incumbrance, or it be shown that his possession has been disturbed, or his use or enjoyment of the land has in some way been interfered with by reason of the incumbrance.² In Illinois, the covenants of seizin and against incumbrances are differently expounded. They are thus compared in a late case:³ "Where the covenant of seizin is broken, and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damages, and all the damages that can result from the breach, have accrued; the measure of damages is the purchase money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of *choses in action*. But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby; or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary *chose in action*." And the court further say: "As the doctrine of covenants running with land is an exception to the common law rule that choses in action are not assignable, why limit its sphere of usefulness, and confine it to those covenants which may be broken in the future? May it not as well extend to such as have been only nominally broken at the time of the assignment, and the substantial breach occurs afterwards, and

¹ See Ohio cases just cited, and *Stambaugh v. Smith*, 23 Ohio St. 534.

² *Stambaugh v. Smith*, *supra*.

³ *Richard v. Bent*, 59 Ill. 58.

the whole damages are sustained by the assignee? It does not appear to be a sufficient answer, that the rule denying the action to the assignee creates only a formal difficulty, as the assignee may maintain an action in the name of the assignor for his use. This is a cumbrous form of remedy, and the remedy is liable to be embarrassed. In the case in hand, such rule would require this suit, as we understand, to be brought in the name of the assignee in bankruptcy, . . . and to establish the right of action in such assignee might be a serious inconvenience. If it be held that the real cause of action on such a covenant accrues immediately upon the making of the deed, it would seem that the statute of limitations would then commence to run, when the breach was only formal, and no actual damage suffered or recoverable, and when, perhaps, the incumbrance was not even discovered; and afterwards, when the incumbrance comes to be discovered, or when the actual loss on account of the incumbrance arises, and the substantial breach takes place, the statute of limitations may have run against the action. In the state of the authorities, not feeling embarrassed by any former decisions of our own upon the point, we feel free to adopt the rule which we regard as the more reasonable and just. That is obviously the one which sustains this action in the present form [in the name of the assignee of the covenant], for the breach of the covenant against incumbrances, and admittedly so by courts which have felt constrained to lay down the contrary rule, only in supposed obedience to the strict common law rule."

CRITICISM OF THE RULE OF DAMAGES.—It appears to be assumed very generally in this country, that the mere existence of a money incumbrance upon land is no injury to a purchaser; that unless the incumbrance has been asserted, or the covenantee has paid something to extinguish it, there is a mere technical breach, for which only nominal damages should be allowed, and only grudgingly conceded to be a right of action;¹ that it would be unjust to allow the covenantee, who may never be disturbed by the incumbrance, to recover the amount for which it is security from the covenantor, for the lien is only collateral to a personal obligation which might still be enforced against the

¹See *Richard v. Bent*, *supra*.

covenantor; and to permit such a recovery would not only expose the covenantor to the danger of being called upon to pay the debt a second time, but would give the covenantee a certain compensation for an uncertain and contingent loss. To avoid this supposed injustice, the general course of decision in this country has been to deny the covenantee more than nominal damages for the mere existence of a money incumbrance covenanted against, or to oblige him to extinguish it; or else to treat the covenant as a continuing one in favor of the owner, who may pay it or be foreclosed by it—even a remote grantee, who has been denominated “the last purchaser and the first sufferer.”

This view is so firmly fixed in our jurisprudence, it is probably idle to question or criticise it; but it may be remarked that the rules on this subject are not modified when the mortgage or other incumbrance is not collateral to any personal obligation of the covenantor. No exception is made where there is no personal obligation, or where the incumbrance was created by some former owner. Where it is actually security for the covenantor's personal obligation, as payment pending the suit entitles the covenantee, as plaintiff, to increase his damages by the amount paid, there is no sound reason for requiring him to advance the money for that purpose, since a payment of the incumbrance by the party whose covenant is broken, after suit brought on the covenant against him, would certainly go in mitigation, and avert the danger of a second recovery. Nor is it true that the recovery of substantial damages for the mere existence of an incumbrance on premises sold and warranted to be unincumbered, is obnoxious to the objection of allowing a certain compensation for a contingent loss. This is affirmed by a preponderance of authority in respect to the covenant of seizin, which is of the same nature. The existence in a third person of a paramount title justifies a full recovery as for want of that title. But it is said the covenant against incumbrances is one of indemnity. True; but it is so as a consequence of this rule of damages. Why should it be deemed more a covenant of that description than any other in a deed? It is designed for the same general purpose, to assure to a purchaser the full benefit of his purchase. While the incumbrance exists,

the granted premises are diminished in market value to the amount of the incumbrance. The purchaser to that extent fails to obtain the fruits of his purchase; to that extent the seller has purchase money for which he has not fulfilled, as contemplated, the contract of sale. An incumbrance is deemed in other cases to produce real injury, if its existence impairs the market value of the land; for, universally, incumbered land is estimated at a value reduced by the amount of the incumbrance for all the purposes of ownership. The right of recovery on this covenant for the existence of an easement or any permanent incumbrance is commensurate with this reduction of value. The fact that an estate can be sold is one of its elements of value, and is not to be excluded from consideration.¹

If this covenant is held to run with the land, it will pass by a deed without covenants — by even an execution sale. On what hypothesis is the last purchaser the first sufferer? Only on the supposition that he has bought the premises as unincumbered and paid full value. Then, if he has purchased without covenants, it may be just to allow him the benefit of the covenant to his grantor, who would, in the case supposed, have no occasion to avail himself of it, but the first sufferer would then be saved from loss only by the provident caution of his grantor. But if, as is presumably the case more frequently, the land is sold with a knowledge of the incumbrance, and without any covenant against it, the purchaser buys at a price reduced on account of the incumbrance, and the reduction of the price is equal to or greater than the amount which must be paid to disincumber the title. In that case, if the purchaser has the benefit of the covenant, he may discharge the incumbrance and reimburse himself by a suit on the covenant against the original grantor, and thus obtain a clear title for a price reduced by reason of an incumbrance which costs him nothing to remove.

RULE OF DAMAGES WHERE INCUMBRANCE IS PERMANENT OR CANNOT BE REMOVED.—Incumbrances of the second class are not removable at the will of the seller or purchaser; and when the covenant against incumbrances is broken by the existence of such an incumbrance, recovery may be had in an action brought

¹ *Wetherbee v. Bennett*, 2 Allen, 428.

at once, proportioned to the actual injury; and if no actual injury can be inferred, or is not proved, nominal damages only can be recovered. The inquiry in such cases, adapted to the particular circumstances, is, what is the injury naturally and proximately resulting from the existence of the incumbrance, to the purchaser.¹

For the existence of a mere inchoate right of dower only nominal damages can be given, for during the life of the husband it is uncertain that any loss whatever will ever occur; and so, if the right is consummated by the death of the husband, so long as the dower has not been assigned; for the widow may never procure an assignment of dower.² It was held in an early Massachusetts case,³ that the existence of a paramount right to the premises was an incumbrance. It was held that if the plaintiff had not extinguished the right, and it still remained against the title, the plaintiff could only recover nominal damages; but if he had, at a just and reasonable price, extinguished such paramount title, so that it could never afterwards prejudice the grantor, the price so paid would be the measure of damages.

Where the incumbrance was a right of way over the granted land for the purpose of taking water from a spring situated on it, the covenantee was held entitled to just compensation for the real injury resulting from the continuance of the easement.⁴ Just compensation in such case has generally been estimated by the amount which the existence of the easement reduces the market value of the land.⁵ Though the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way, and the right had been extinguished without any expense, the court refused to instruct the jury to return a verdict

¹ Kellogg v. Malin, 50 Mo. 496; Barlow v. McKinley, 24 Iowa, 69; Beach v. Miller, 51 Ill. 206; Butler v. Gale, 27 Vt. 739; Van Wagner v. Van Norstrand, 19 Iowa, 427; Prescott v. Freeman, 4 Mass. 627; Batchelder v. Sturges, 3 Cush. 205; Hubbard v. Norton, 10 Conn. 422; Harlow v. Thomas, 15 Pick. 66; Giles v. Dugro, 1 Duer, 335; Willson v. Willson, 25 N. H. 229; Chapel v.

Bull, 17 Mass. 212; Green v. Creighton, 7 R. I. 1.

² Hazelrig v. Huston, 18 Ind. 481; Sheaf v. O'Neil, 9 Mass. 13; Runnells v. Webber, 59 Me. 488.

³ Prescott v. Freeman, 4 Mass. 62.

⁴ Harlow v. Thomas, 15 Pick. 66.

⁵ Giles v. Dugro, 1 Duer, 331; Kellogg v. Malin, 62 Mo. 429; William-son v. Hall, id. 405.

of nominal damages only. It was held not to follow from these facts that there was no actual damage. While the right of way lasted the plaintiff was precluded from using the part of the land covered by the way as fully as he otherwise might have done. He could not set a tree, or a post, or a building upon it; or enclose or cultivate it; or sell or lease it to any person to whom such an incumbrance would be objectionable. It was an apparently permanent subtraction from the substance of the estate. The court approved of the instruction that the plaintiff was entitled to just compensation for the real injury resulting to the estate in its market value from the incumbrance.¹ And this measure of compensation cannot be modified by showing that, notwithstanding the incumbrance, the premises are susceptible of some of the beneficial uses incident to ownership; nor can the damages be enhanced by showing special injury from the incumbrance by reason of some special use the purchaser intended to make of the premises, but which was not communicated to the seller and did not form the basis of the contract of purchase.²

In a case where the incumbrance consisted of a prior grant of timber growing on the land, which was a farm, with the privilege of entering to cut it during a future term, the covenant was broken as soon as made, and it was held that the measure of this just compensation was the value of the timber, for the purposes of the farm, at the time of the grant.³ In another case, where the incumbrance was an existing contract running with the land to fence a railroad passing through the premises, it was held that the inquiry in respect to damages was how much the lands charged with the obligation of maintaining the fence was affected by that obligation; in other words, how far the existence of that incumbrance impaired the value of the estate to the owner, and what would be the difference in its fair market value by reason of the existence of this incumbrance.⁴ An outstanding lease may be an incumbrance, and when it is, and there is a suspension of the covenantee's

¹ *Wetherbee v. Bennett*, 2 Allen, 428.

³ *Cathcart v. Bowman*, 5 Pa. St. 217.

² *Id.*; *Batchelder v. Sturges*, 3 Cush. 201.

⁴ *Bronson v. Coffin*, 108 Mass. 175; S. C. 118 Mass. 156; *Burbanks v. Pilsbury*, 48 N. H. 475.

enjoyment during its continuance, the annual value or the interest on the purchase money has been allowed for that time as damages;¹ and in another instance the fair rental value of the land to the expiration of the term.²

Where the incumbrance is a life estate, its value for the time the purchaser is kept out of the enjoyment is the rule of damages;³ and, as has already been said, the duration of a life may be determined by life tables.⁴

If the covenantee extinguishes an incumbrance of this class, the amount which he fairly and reasonably pays for that purpose will be the measure of damages.⁵ The covenantee must show that the sum paid was reasonable, and otherwise than by proving the fact that he paid it.⁶

WHERE THE COVENANT IS CONNECTED WITH THAT FOR QUIET ENJOYMENT.—The covenant against incumbrances in use in England, and, to some extent, also in this country, is connected with the covenant for quiet enjoyment, and is to the effect that the grantee shall enjoy the premises free of incumbrances. It is not broken by the mere existence of an incumbrance, and hence there can be no recovery of nominal damages based upon that fact. It assures the purchaser against disturbance in the future, by means of any incumbrance, and hence runs with the land.⁷

COVENANT TO PAY OFF INCUMBRANCES.—Another form of covenant relating to incumbrances is that to pay and discharge them. This form of covenant usually relates to some pecuniary lien or charge on the land which the covenantor has the right to remove by payment. If he neglects to perform this covenant within the time fixed therefor, the covenantee, without

¹ Rickert v. Snyder, 9 Wend. 416.

² Porter v. Bradley, 7 R. I. 542. Compare Batchelder v. Sturges, 3 Cush. 201. See Van Wagner v. Van Nostrand, 19 Iowa, 422; Grace v. Scarborough, 2 Spear, 649.

³ Christy v. Ogle, 33 Ill. 295.

⁴ Mills v. Catlin, 22 Vt. 106.

⁵ Chapel v. Bull, 17 Mass. 213; Mitchell v. Hazen, 4 Conn. 495.

⁶ Anderson v. Knox, 20 Ala. 156; St. Louis v. Bissell, 46 Mo. 157; Dickson v. Desire, 23 Mo. 151, 167.

⁷ See Martin v. Barber, 5 Blackf. 232; Hutchins v. Moody, 30 Vt. 658; Carter v. Denman, 23 N. J. L. 260; Grace v. Scarborough, 2 Spear, 652; Green v. Creighton, 7 R. I. 1; Jeter v. Glenn, 9 Rich. L. 374; Rawle on Cov. T. (4th ed.) 89, 90.

having paid anything to extinguish the lien, is entitled to recover, by the uniform course of decision, the present amount of the incumbrance.¹ There is a difference between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damage by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then, unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid it. But if it be to discharge or acquit the plaintiff from any damage by reason of such bond or particular thing, then it is a condition to indemnify and save harmless.²

But where it affirmatively appears that the promisees were not liable, and had no personal debit relations with the creditor, if such promisees can recover at all, they can only recover what they have lost by the default. This is the general rule of damages; to which the cases giving the debtor damages to the amount of his debt, against one who agrees to pay it, are exceptions, resting on special reasons.³ When the instrument deviates the least from a simple contract to indemnify against damages, even where indemnity is the sole object of the contract, and where, in consequence of the prior liability of other persons, no actual loss may be sustained, the decisions, though not heretofore altogether harmonious, have gradually inclined to allowance of actual compensation measured by the full amount of the liability which the defendant undertook to pay.⁴

¹Lithbridge v. Mytton, 2 B. & Ad. 772; Carr v. Roberts, 5 id. 78; Gardner v. Niles, 16 Me. 279; Jennings v. Norton, 35 id. 308; Booth v. Starr, 1 Conn. 249; Lathrop v. Atwood, 21 id. 123; Dorsey v. Dashiell, 6 Md. 204; Hogan v. Calvert, 21 Ala. 199; Ardesco Oil Co. v. N. A. Mining Co. 66 Pa. St. 381; Scoby v. Fenton, 39 Ind. 275; Manchon v. Smith, 19 Ohio St. 384; Gilbert v. Wyman, 1 Comst. 550; Ex parte Negus, 7 Wend. 499; Webb v. Pond, 19 id. 423. See Wetmore v. Green, 11 Pick. 462. See also Young v. Stone, 4 W. & S. 45.

²1 Saunders, 117, note (1); Booth

v. Starr, 1 Conn. 244, 250; Munn v. Eckford, 15 Wend. 502; Keep v. Brigham, 6 John. 158; Thomas v. Allen, 1 Hill, 145; Rockfiller v. Donnelly, 8 Cow. 623; Chace v. Hinman, 8 Wend. 452.

³Pratt v. Bates, 40 Mich. 37.

⁴Id.; Hodgson v. Bell, 7 T. R. 97; Deval v. McIntosh, 23 Ind. 529; Johnson v. Britton, id. 105; Scoby v. Fenton, 39 id. 275; Warwick v. Richardson, 10 M. & W. 284; Sparkes v. Martindale, 8 East, 593; Ross v. Pye, Yelv. 207; Wood v. Wade, 2 Stark. 167; Thomas v. Allen, 1 Hill, 146; Holmes v. Rhodes, 1 B. & P. 638; Post v. Jackson, 17 John. 239;

SECTION 6.

DEFENSES AND CROSS CLAIMS AGAINST PURCHASE MONEY.

Review of the diverse decisions on this subject.

Independent of the provisions of the modern code regulating counterclaims, there has not been much uniformity of practice in respect to defenses which may be made in actions for purchase money. In some states, this defense, in actions upon contract, has been permitted, to some extent, under the name of failure of consideration, and in others under the name of discount or recoupment. This general subject has been considered as a separate topic;¹ now we will briefly refer to the practice relative to allowing the damages for breach of these covenants, as a full or partial defense in actions at law and suits in equity for purchase money.

Where there is a right to substantial damages for breach of any covenant in the deed, and these damages are presently recoverable from the party to whom unpaid purchase money is payable, it prevents circuity and multiplicity of actions to permit both claims to be proved, and to compensate each other, in one action.

In an early case in New York,² the defense of a defect of title, without eviction, was allowed, although the essential conditions did not exist for recovery of damages on the covenants in the deed. For this reason, the case, upon this point, was afterwards overruled in that state,³ and has been generally disapproved. In the later case of Tallmadge v. Wallis,⁴ there was a breach of the covenant of seizin, and based upon it was a plea of a total want of consideration in bar of an action upon a bond for purchase money. The plea was held bad on demurrer, because there was no allegation that the defendant "obtained no estate or interest whatever under the conveyance;" for in the absence

Churchill v. Hunt, 3 Denio, 321;
Farquhar v. Morris, 7 T. R. 124;
Smith v. Pond, 11 Gray, 234; Stewart v. Clark, 11 Met. 384. See Stephens v. Boulton, 23 U. C. Q. B. 16.

¹ Vol. I, p. 261.

² Frisbie v. Hoffnagle, 11 John. 50.

³ Vibbard v. Johnson, 19 John. 77; Lattin v. Vail, 17 Wend. 188; Whitney v. Lewis, 21 id. 131; Tallmadge v. Wallis, 25 id. 107; Lamer-son v. Marvin, 8 Barb. 14.

⁴ 25 Wend. 107.

of an allegation to the contrary, it would be presumed that he obtained possession of the premises, and therefore that there was not an entire want of consideration. There can be no inference that possession delivered by a seller having no title is a benefit conferred by the conveyance, if so recent that the superior owner can recover mesne profits for the whole time it was enjoyed; hence the judgment on the demurrer in that case indicates that in New York recovery of full damages, measured by the consideration money, cannot be had for breach of the covenant of seizin, if the covenantor received possession, and has not been evicted. It is true, however, that if possession for which the party receiving and enjoying it will be liable to a third person as superior owner, is of any value, there is not in fact an entire want of consideration. But in a legal sense, in view of the rules for measuring damages for breach of the covenants for title, such a possession is of no appreciable value, as a benefit moving from the grantor, because, for all that it is deemed to be legally worth, he is held liable to the superior owner, and during the period of such liability he is not treated as receiving any benefit under the conveyance from the covenantor; nor is he charged with any such benefit in reduction of damages, otherwise recoverable, in any action for the breach of those covenants. The opinion in this case favors the allowance against purchase money, upon proper pleading, of all damages which are recoverable for breaches of the covenants in the deed.¹ The chancellor referred to the cases which had established in that state the right of recoupment for partial failure of consideration, and said, as there was not a total failure, the defendants, *therefore*, instead of pleading in bar of the action, should have pleaded the general issue *non est factum*, and given notice with such plea of the *partial* failure of title, for the purpose of reducing the amount to be recovered from the bond. In a more recent case, in that state, to an action to foreclose a purchase money mortgage, the defense of a partial failure of title was attempted; the deed contained the covenants of seizin and warranty. The court held the defense inadmissible, because there had been no eviction, or disturbance of the defendant's possession; that as to the right of

¹See also *Bush v. Marshall*, 6 How. Pr. 284; *Curtiss v. Bush*, 39 Barb. 661.

such a defense there was no difference between a breach of the covenant of seizin and one of the covenant of warranty.¹

In Alabama there would seem to be no right of recoupment of damages at law for breach of the covenants in actions for purchase money. The reason assigned is that a court of law cannot do complete justice between the parties.² Goldthwaite, J., said: "Such a defense, whatever be its merits, cannot be called a failure of consideration for which the notes were given; because, if there were no warranty whatever, the defendant would be without any remedy. It follows, that if he is now entitled to any remedy, it must be in consequence of the warranty, and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable. Without stopping now to inquire whether these circumstances afford a reason for equitable interposition and relief, we think it clear that they do not make out a *legal* defense, even in a case where the recovery on the covenant of warranty ought to be equal or larger than the sum sued for. The reasons which induce this conclusion are these: In the first place the damages to be recovered on the covenant of warranty are in their nature unliquidated, and therefore are not the subject of a set-off, according to our judgment in the case of *Dunn v. White*; ³ secondly, the covenant of warranty would not be extinguished by this defense; thirdly, the covenant itself operates as an estoppel to the grantor, and would have the effect to transfer to the purchaser or his assigns any subsequently acquired title which should be vested in the grantor; fourthly, by the conveyance all the covenants running with the land are *ipso facto* assigned to the purchaser." If the purchaser accept a deed with warranty, he cannot set up either fraud or failure of consideration, at law, as a defense to an action upon notes given for purchase money.⁴ If, however, the deed be

¹ *Farnham v. Hotchkiss*, 2 Keyes, 9. See *Parkinson v. Jacobson*, 13 Hun, 317.

² *Bliss v. Smith*, 1 Ala. 273; *Cullum v. Branch Bank*, 4 Ala. 21.

³ 1 Ala. 645.

⁴ *Starke v. Hill*, 6 Ala. 785; *Tankersly v. Graham*, 8 id. 247; *Cole v.*

Justices, id. 793; *Knight v. Turner*, 11 id. 636; *McLemore v. Mabson*, 20 id. 139; *Patton v. England*, 15 id. 69; *Peden v. Moore*, 1 Stew. & P. 81; *Homer v. Purser*, 20 Ala. 573; *Thompson v. Christian*, 28 id. 399; *Helvenstein v. Higgason*, 35 id. 259; *Andrew v. McCoy*, 8 id. 920.

void, a defense of total failure of consideration may be made at law.¹

In Mississippi, Yerger, J., said, in a case decided in 1852,² that, "Upon examining the various cases decided in that state in relation to the relief which a vendee of lands is entitled to receive, on account of the failure or defect of title, the following rules are clearly established: First, where a contract for the sale of real estate has been executed, and the vendee has received a deed with covenants of warranty, and taken possession of the land, he cannot in a case free from fraud or misrepresentation, avoid a judgment for purchase money, either at law or in equity, on account of a defect or failure of title, unless he has been evicted. Second, if there has been fraud or misrepresentation in relation to the validity of the title, or the absence of incumbrance on it, a court of law or equity, if the title be defective or incumbered, will relieve from payment of the purchase money, without eviction, notwithstanding a party may have received a deed with covenants of general warranty, and gone into possession of the land. Third, where the vendee, at the time of his purchase, knew of the defect of title, or the existence of incumbrances on the estate, and took a deed with covenants of warranty, he cannot at law avoid a recovery, even after eviction, but must rely upon the covenant. Nor will a court of chancery, in such a case, as a general rule, grant any relief; but will remit the party to his covenants, such being the remedy provided for himself." In a later case,³ the court say: "It has been repeatedly decided by learned and able judges, in this country, not in virtue of any statutory provision, but upon principles of justice and convenience, and with a view of preventing litigation and expense, that where fraud has occurred in obtaining, or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense, when sued upon such contract, in all cases where the title to real estate is not involved; and that he shall not be driven to assert them either for protection or as

¹Wiley v. White, 2 Stew. 331;
Stark v. Henderson, 30 Ala. 438.

²Wailes v. Cooper, 24 Miss. 208.

³Myers v. Estell, 47 Miss. 4

a ground for compensation in a cross action. And although there is some diversity of judicial opinion upon the subject, it is believed to be the better opinion that this defense cannot, in general, be made where the partial failure relates to title to real estate merely, and this is predicated upon the exclusive and peculiar jurisdiction of equity over the title to real estate, in causing it to be perfected, and upon the further consideration that the vendee, in general, sustains no injury by a partial defect of title, so long as he retains possession, as also because it would be without the principle upon which recoupment is allowed in the common law courts, inasmuch, as for want of that peculiar jurisdiction of the equity courts to cause defective titles to be perfected, they could not do final and complete justice in the premises, and terminate all further litigation touching the contract.¹

In Tennessee, Arkansas, Michigan, Virginia, and Illinois, a purchaser may avail himself of eviction or other breach of the covenants for which he is entitled to substantial damages as a full or partial defense to an action for purchase money.² In Florida,³ it has been held that, in an action upon a note for purchase money of land, an equity existing in a third person is not sufficient to sustain a plea of failure of consideration. A mere equity in another person is no defense at law; there must be fraud or eviction, or something equivalent thereto; or admitted or unquestionable paramount title. In Maine, the law appears to be settled that there can be no defense at law against the collection of a purchase money note on the ground

¹See *Laughman v. Thompson*, 6 Sm. & M. 259; *Chaplain v. Briscoe*, 5 id. 198; *Kilpatrick v. Dye*, 4 id. 289; *Wiley v. Hightower*, 6 id. 345; *Hoy v. Taliaferro*, 8 id. 727; *Vick v. Percy*, 7 id. 256; *Stone v. Buckner*, 12 id. 73; *Duncan v. Lane*, 8 id. 744; *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Puckett v. McDonald*, 6 id. 269; *Winstead v. Davis*, 40 Miss. 785; *Heath v. Newman*, 11 Sm. & M. 201; *Glenn v. Thistle*, 23 Miss. 42; *Miller v. Lamar*, 43 id. 383; *Wofford v. Aschraft*, 47 id. 641; *Ware v.*

Houghton, 41 id. 382; *Feemster v. May*, 13 Sm. & M. 275.

²*Edmunds v. Porter*, 2 Cold. 42; *Walker v. Johnson*, 13 Ark. 522; *Griggs v. D. & M. R. R. Co.* 10 Mich. 117; *McDaniel v. Grace*, 15 Ark. 489; *Slack v. McLagan*, 15 Ill. 242; *Knapp v. Lee*, 3 Pick. 459; *Rice v. Goddard*, 14 Pick. 293; *Pence v. Huston*, 6 Gratt. 304; *Doremus v. Bond*, 8 Blackf. 368; *Morgan v. Smith*, 11 Ill. 194, 200; *Schuchman v. Knoeble*, 27 Ill. 175.

³*Long v. Allen*, 2 Fla. 402.

of a partial failure of title.¹ And it has been so held also in Massachusetts.²

The code has been adopted in many of the states and territories, and defines very uniformly what counterclaims may be set up in the answer; it may contain a statement of any new matter constituting a defense or counterclaim. The latter is defined to be, first, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; secondly, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Under these provisions, of course, any claim of damages for which an action could be maintained for breach of the covenants, or for equitable relief in respect to them, would be available in the form of a counterclaim.³

¹ Lloyd v. Jewell, 1 Greenlf. 352; Wentworth v. Goodwin, 21 Me. 154; Jenness v. Parker, 24 id. 294; Herbert v. Ford, 29 id. 554; Morrison v. Jewell, 34 id. 146; Thompson v. Mansfield, 43 id. 490.

² Bowley v. Holway, 124 Mass. 395.

³ Walker v. Wilson, 13 Wis. 522; Hale v. Gale, 14 id. 54; Akerly v. Vilas, 21 id. 109; S. C. id. 377; Eaton v. Tallmadge, 22 id. 526; Lowry v. Hurd, 7 Minn. 362; Small v. Reeves, 14 Ind. 163. See Ludlow v. Gilman, 18 Wis. 552; Taft v. Kessell, 16 id. 273; Don v. Stricker, 18 Minn. 26.

In Akerly v. Vilas, 21 Wis. 109, Downer, J., said: "Before the code, it was well settled that in suits brought to foreclose mortgages for the purchase money, in which the mortgagor, being in possession of the lands, set up a partial failure of title as a defense, without averring an actual eviction, or an action of ejectment brought, or that he was in any way disturbed in his possession, the court would not interfere, but leave him to his action at law. Van Waggoner v. McEwen, 1 Green's

Ch. 412; Abbott v. Allen, 2 John. Ch. 519; Platt v. Gilchrist, 3 Sandf. 118; Simpson v. Hawkins, 1 Dana, 303; Rawle on Cov. for Tit. (3d ed.) 676, 686. Courts of equity declined to go into such defenses, because title to lands could better be tried in actions at law, and the damages were often unliquidated and not the subject of set-off; and also because the possession of the defendant, being undisturbed, might ripen into a perfect title. But the code allows a counterclaim to be set up in an answer to a foreclosure action, as well as in others. It is no objection to such counterclaim or claims that the damages are unliquidated, or that the claims are legal or equitable, or both; for claims legal or equitable, for liquidated and unliquidated damages on contracts, may all be set up in the same answer. The defendant who sets up by way of counterclaim a cause of action based upon the covenants in a deed, is entitled to recover the same damages as he would have recovered if he had brought a sepa-

In those jurisdictions which have entertained the defense of an entire or partial failure of title in actions on securities for purchase money, the conflict of opinion has been chiefly in respect to the allowance of damages for breach of the covenant of seizin when the facts would not justify recovery on the other covenants. There has been greater reluctance to permit a recovery in such cases where the amount is sought to be deducted from unpaid purchase money, especially in suits for foreclosure of liens in equity, than in actions by the covenantee at law on the covenant.¹

In courts of equity, the protection of purchasers against the collection of purchase money where there are defects of title covered by covenants is more ample, and the jurisdiction more generally and uniformly exercised than at law. It is available, first, where the seller comes into equity to enforce payment of purchase money by marshaling or administering assets, foreclosure of securities, or the like, and there is such a defect of title, or such expenses or payments, to extinguish a paramount

rate action on these covenants. If he declares upon the covenant of seizin and alleges breaches, it is no defense to his claim that he is in undisturbed possession of the premises. He is entitled to recover his actual damages, whatever they may be, the same as in a suit at law before the code."

¹ Mr. Rawle (in Cov. Tit. 590, 4th ed.) says: "In suing upon this covenant, cases may occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may be still in possession, yet the failure of title is so complete as to authorize the assessment of damages by the consideration money, or a proportionate part of it; and in such cases it might be proper and even necessary for the plaintiff to offer to reconvey the interest or title actually vested in him, and that, although it would be no bar to his recovery that he had not done so, yet that the court might

stay the execution, or reserve the actual entry of the judgment, till such conveyance were made. It is difficult to say how far this doctrine can be made to apply to actions where the defendant seeks to detain the purchase money under similar circumstances. On the one hand, there are reasons growing from the desire to prevent circuity of action, and the injustice that may often arise by reason of the delay, expense and risk of the vendor's insolvency, to which the purchaser may be put by turning him round to his action on the covenant. On the other, the temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor, is such as may induce a leaning in favor of the rule, that unless there has been a *bona fide* eviction, actual or constructive, the parties must be left to pursue the remedies originally provided for themselves."

title or incumbrance, as would sustain an action at law on the covenants for substantial damages. The court will apply these damages, ascertained according to its practice, *pro tanto* to the satisfaction of the plaintiff's claim, and only decree for the plaintiff the balance.¹ Second, in the exercise of its *quia timet* jurisdiction, as where there is already an actionable breach of the covenants, and the damages therefor are not a defense in a suit for purchase money, or there has been no opportunity to make it; or a loss of the estate from the pendency of actions to enforce a paramount title or incumbrance is imminent, and by reason of the absence or insolvency of the covenantor, the remedy by action at law on the covenants will be unavailing.²

Where the only covenants in the deed are those for quiet enjoyment and of warranty, and there has been no eviction, actual or constructive, equity will not, as a general rule, interfere to prevent the collection of purchase money.³

¹ *Detroit & M. R. R. Co. v. Griggs*, 12 Mich. 45; *Coster v. Monroe Manuf. Co.* 2 N. J. Eq. 467; *Glenn v. Whipple*, 12 id. 50; *Van Waggoner v. McEwen*, 2 id. 412; *Earl of Bath v. Earl of Bedford*, 2 Ves. Sr. 587; *Fergus v. Gore*, 1 Sch. & Lef. 107; *Lovell v. Sherwin*, 2 Eq. R. 329; 23 Eng. L. & Eq. 534; *Parker v. Harvey*, 2 Eq. Cas. Abr. 460; *In re Dickson*, L. R. 12 Eq. 154; *Van Riper v. Williams*, 2 N. J. Eq. 407; *Dayton v. Dusenbury*, 25 N. J. Eq. 110; *White v. Stretch*, 22 N. J. Eq. 79; *Fowler v. Boling*, 6 Barb. 165; *Noonan v. Lee*, 2 Black, 499; *York v. Allen*, 30 N. Y. 104; *Norton v. Jackson*, 5 Cal. 262; *Pickett v. McDonald*, 6 How. (Miss.) 269; *Kilpatrick v. Dye's Heirs*, 4 Sm. & M. 289.

² *Crenshaw v. Smith*, 5 Munf. 415; *Stockton v. Cook*, 3 id. 68; *Clark v. Hardgrove*, 7 Gratt. 399; *Yancy v. Lewis*, 4 Hen. & Munf. 390; *Jones v. Waggoner*, 7 J. J. Marsh. 144; *Trumbo v. Lockridge*, 4 Bush, 417; *Andrews v. McCoy*, 8 Ala. 920; *McLemore v. Mabson*, 20 id. 139; *Wyatt*

v. Greer, 4 Stew. & P. 318; *Kelly v. Allen*, 34 Ala. 663; *Smith v. Pettus*, 1 Stew. & P. 107; *Beebe v. Swartwout*, 8 Ill. 177; *Vick v. Percy*, 7 Sm. & M. 268; *McGehee v. Jones*, 10 Ga. 135; *Happes v. Check*, 21 Ark. 588; *Vance v. House*, 5 B. Mon. 540; *Young v. Butler*, 1 Head, 640; *Perciful v. Hurd*, 5 J. J. Marsh. 672; *Ingram v. Morgan*, 4 Humph. 66; *Lockett v. Triplett*, 2 B. Mon. 39; *Champlin v. Dotson*, 13 Sm. & M. 553; *Wofford v. Ashcraft*, 47 Miss. 641; *Atwood v. Vincent*, 17 Conn. 575; *Davis v. Logan*, 5 B. Mon. 341; *Jones v. Stanton*, 11 Mo. 433; *Denny v. Wickliff*, 1 Met. (Ky.) 236; *Green v. Campbell*, 2 Jones' Eq. 446; *Shannon v. Marselis*, 1 N. J. Eq. 413; *Hatcher v. Andrews*, 5 Bush, 561; *Simpson v. Hawkins*, 1 Dana, 303; *Willy v. Fitzpatrick*, 3 J. J. Marsh. 582; *Morrison v. Beckwith*, 4 T. B. Mon. 73.

³ *Platt v. Gilchrist*, 3 Sandf. 118; *Patten v. Taylor*, 7 How. (U. S.) 132; *Refeld v. Woodfolk*, 22 How. U. S. 318; *Noonan v. Lee*, 2 Black, 499;

In South Carolina, the covenant of warranty includes the covenant of seizin, and therefore a breach does not depend on an eviction.¹ Formerly there were three classes of cases in which a purchaser could be relieved in part or in whole from the payment of the purchase money:² First, where there was a partial failure of consideration, as where part of the land sold and conveyed was covered by a paramount title, which might, and in the opinion of the jury would, so far deprive the party of the benefit of his purchase. This has been essentially matter of discount,³ and could be given in evidence only under a notice of discount. In such case the measure of damages to be allowed to the party on his covenant of seizin was the *pro rata* value of the land covered by the paramount title, estimated by the purchase money, and interest, and the relative value of the land lost to the land remaining.⁴ The second class was where the grantor, when he sold and at the trial, had no title to the

Bumpus v. Platner, 1 John. Ch. 213; Abbott v. Allen, 2 id. 519; Gouverneur v. Elmendorf, 5 id. 79; James v. McKernan, 6 John. 543; Prevost v. Gratz, 3 Wash. C. C. 434; Beach v. Waddill, 8 N. J. Eq. 299; Leggett v. McCarty, 3 Edw. Ch. 124; Woodruff v. Bunce, 9 Paige, 443; Greenleaf v. Queen, 1 Pet. 133; Whitworth v. Stuckey, 1 Rich. Eq. 409; Van Lew v. Parr, 2 id. 321; Maner v. Washington, 3 Strobb. Eq. 171; Young v. McClung, 9 Gratt. 336; Long v. Israel, 9 Leigh, 556; Young v. Butler, 1 Head, 640; Buchanan v. Alwell, 8 Humph. 518; Elliott v. Thompson, 4 id. 99; Lewis v. Morton, 5 T. B. Mon. 1; Vance v. House, 5 B. Mon. 537; Casey v. Lucas, 2 Bush, 55; Ohling v. Luitjens, 32 Ill. 23; Beck v. Simmons, 7 Ala. 76; Willy v. Hightower, 6 Sm. & M. 345; McDonald v. Green, 9 Sm. & M. 138; Beebe v. Swartwout, 8 Ill. 162; Eddington v. Nix, 49 Mo. 134; Cooley v. Rankin, 11 Mo. 647; Middlekauf v. Barrick, 4 Gill, 290; Hull v. Priest, 6 Bush, 12; Busby v.

Treadwell, 24 Ark. 456; Hele v. Davidson, 20 N. J. Eq. 228; Halfish v. O'Brien, id. 230; Ludlow v. Gilman, 18 Wis. 552; Akerly v. Vilas, 21 id. 88; Tims v. Shannon, 19 Ind. 296; Merritt v. Hunt, 4 Ired. Eq. 406; Wilkins v. Hogue, 2 Jones' Eq. 479; Henry v. Elliott, 6 id. 175; Clanton v. Buges, 2 Dev. Eq. 13; Beale v. Sciveley, 8 Leigh, 658; Perciful v. Hurd, 5 J. J. Marsh. 670; Miller v. Long, 3 A. K. Marsh. 334; Anderson v. Lincoln, 5 How. (Miss.) 279; Gartman v. Jones, 24 Miss. 234; Wailes v. Cooper, id. 208; Edwards v. Morris, 1 Ohio, 239; Stone v. Buckner, 12 Sm. & M. 73; Maxfield v. Bierbauer, 8 Minn. 420; Glenn v. Whipple, 12 N. J. Eq. 50.

¹ Johnson v. Purvis, 1 Hill, 208; Sumter v. Welch, 1 Brev. 421; Johns v. Nixon, 2 Brev. 136.

² See Van Lew v. Parr, 2 Rich. Eq. 347.

³ Farrow v. Mays, 1 Nott. & McCord, 312.

⁴ Furman v. Elmore, 2 Nott. & McC. 199.

land. In such case, the vendee having acquired no title, had, of course, no consideration for his promise; and so, when the action was on a parol contract, it was a *nudum pactum*, and the vendee might be relieved at law. The defense could be made under the general issue.¹ But in an action upon a specialty, before the act of 1831, the defense had to be specially pleaded or set up by way of discount.² That act merely let the party into his defense under a notice instead of a plea. In a suit on a specialty, therefore, it was deemed proper for the defendant to consider his covenant of seizin as broken to the whole extent of the purchase money and interest, and to claim damages accordingly by way of discount. In such case, if the jury was satisfied, that, in fact as well as law, the purchaser took nothing by his title, and that he would be ousted by the paramount title, they might find a verdict for the defendant, not on the ground that the failure of title is a rescission of the contract, but that the damages on the covenant of seizin were exactly equal to the purchase money and interest. It was held not necessary to appeal to equity to put the parties in *statu quo*; because the vendor's deed conveyed no title to the vendee; and the vendor could claim no rents and profits, for his vendee was liable to the owner of the paramount title for the rent of the land during the time he might be in possession.³ Both of these classes have always been regarded as constituting legal defenses, examinable and relievable in courts of law. In the third class, where there was a good title in part, and in whole conveyed by the vendor to the vendee, and the object of the vendee's purchase was defeated, either by a part failure of the title or the failure of some incident to the purchase, represented by the vendor, or shown by the title as resulting from the purchase, the purchaser was formerly held to be relievable at law, although he might be in possession, by a rescission of the contract.⁴ Subsequently, however, the court retraced their steps in respect to this class, and established the doctrine that if the purchaser had not been evicted, the contract could not be rescinded in a court of law, and that the party must seek relief in a court

¹ Farrow v. Mays, *supra*.

⁴ Gray v. Handkinson, 1 Bay, 278;

² Hunter v. Graham, 1 Hill, 370.

State v. Gaillard, 2 Bay, 11.

³ Taylor v. Fulmore, 1 Rich. L. 52.

of equity, because a court of law could not do full and adequate justice between the parties.¹

But at the present day it is still held that in actions brought for the purchase money, the purchaser may make a clear, subsisting, outstanding title the ground of abatement for the contract value of such part of the premises as it may cover.² And so if the warranty of quantity is broken.³ The rule is the same

¹ Carter v. Carter, 1 Bail. 217; Borda v. Cave, 1 Bail. 250; Westbrook v. McMillan, 1 Bail. 259; Johnson v. Purvis, 1 Hill, 326.

² Van Lew v. Parr, 2 Rich. Eq. 347. See Means v. Breckell, 2 Hill, 313; Abercrombie v. Owings, 2 Rich. 127; Jeter v. Glenn, 9 Rich. L. 378.

³ Crawford v. Crawford, 1 Bailey, 128; Ellis v. Hill, 6 Rich. 37. In this case the court say: "The rule, in our courts, long established, is, that in an action upon a security executed for the purchase money of land, bought at a fixed rate per acre, the purchaser may abate the price by proof of deficiency in quantity; and that proof of the sale of so many acres, at a certain rate per acre, may be adduced by parol, and a verdict thereupon shall be reduced, *pro tanto*, according to the deficiency.

"The doctrine is not obnoxious to anything contained in the statute of frauds; nor to that rule of evidence which excludes anything by parol to vary, contradict, add to, or subtract from, written evidence of contract. It proceeds upon the footing of failure of consideration, and has been also adjudged to belong to the rights of a defendant under our discount law (vide Abercrombie v. Owings and al. 2 Rich. 127, which is a case full to the point of the one before us). The case cited, and that of Banks v. Jones, 2 Spears, 68, contain a reference to a multitude of

instances in which the rule has been administered as was done on circuit in the present instance.

"The distinction is where a gross sum has in point of fact been given for a body of land, described by metes and bounds, with quantity mentioned as additional matter of description (which intent may be the more manifest from reference to very specific boundaries, illustrated by plat annexed), and the purchaser obtains the parcel of land accordingly; and where the purchaser has bought by the acre, and stipulated to pay according to the quantity, in point of fact. Another question, dependent upon the position of a purchaser, as plaintiff in an action on the warranty, does not present itself now.

"It is manifest the description contained in the deed of conveyance is not conclusive upon the point under consideration. It was much more specific in the case of Abercrombie v. Owings et al. than in this case; in that a survey had been previously made, though of doubtful accuracy, and the conveyance expressed a gross sum as the consideration, and the quantity was stated at eighty-five acres, 'more or less,' bounded by lines beginning at a corner, and running thence, etc., according to the plat made by the surveyor, Silbert. The conveyance here was for one-ninth part of a tract, whereon a certain person then lived, 'containing six hundred and

in Virginia. In one case,¹ a deed of bargain and sale conveyed a tract of land described as "containing by survey seven hundred and eighty-five acres," giving metes and bounds; the price stated in the deed was \$11,775, which is the product of seven hundred and eighty-five acres at \$15 per acre, there being no other evidence of the terms of the contract. It turning out that there was less than seven hundred and eighty-five acres, it was held that the vendee was entitled to compensation for the deficiency. The vendee enjoined a judgment recovered against him for a balance of the purchase money, alleging a defect in the title to the land which he failed to prove; whereupon the injunction was dissolved and the bill dismissed. Afterwards he brought another suit in which he established a right to compensation for a deficiency in the quantity of the land to an amount equal to the unpaid balance of the purchase money. And it was held that he was entitled to relief as well against the damages which accrued on the dissolution of the first injunction as against the judgment at law.²

Where the equitable title is conveyed, with a right to call for the legal title, the existence of such legal title in a third person will not entitle the grantee to a discount.³

In Texas, also, the purchaser with covenants of warranty may defend against a demand of purchase money without eviction. When he, by competent and sufficient evidence, establishes the existence and validity of an outstanding title, it was early held that there is no reason why his remedy should be delayed

forty acres, more or less, situate in Union district, on the west side of Broad river, adjoining lands belonging to J. H., F. S., W. D., and J. B. Y.' Such was the whole specification and without plat.

"The defense here resisted was allowed in the case cited; a fortiori, it was properly allowed in the case before us.

"No sensible difference arises from the circumstance, that in *Abercrombie v. Owings and al.* it was stipulated, by parol, before the execution of the deed, and the notes

under seal, that a mistake in the quantity should be rectified, when afterwards ascertained. The nature of the contract in this case implied the same. The same objection would exist in either case, the same has been urged, as to the evidence disclosing the nature and terms of the contract. Now, as heretofore, it must be held unavailing."

¹ *Crawford v. McDaniel*, 1 Rob. 448.

² *Keytons v. Branford*, 5 Leigh, 39.

³ *Hodges v. Connor*, 1 Spear, 120; *Johnson v. Purvis*, 1 Hill, 326.

until disturbed in the enjoyment of the land, and this even when the defendant is in possession.¹ But in such a case, whether the failure of title be partial or total, the vendee should offer to reconvey the land as to which the title had failed.² If, however, the purchaser goes into possession under a deed of warranty, having notice of the defects in the title, he is not entitled to withhold the purchase money for failure of the title; for the transaction still remains as the vendee understood it at the time of the purchase; and in that case he will be obliged to await eviction, and rely on his covenant for the damages which result from a breach of it.³

It is necessary to a defense of a failure of title, without eviction, in an action upon a purchase money note, that the vendee should have made the purchase with no notice of the defect.⁴

In Pennsylvania, the doctrines held on the subject now under consideration are peculiar, owing in part to the blending of legal and equitable remedies in the jurisprudence of that state. If the purchase is made with notice of a defect in the title, or of an outstanding incumbrance, there is a presumption that the covenant was expressly taken for protection against it, and if the covenant has been broken, the purchaser has a right to have his damages deducted from the purchase money.⁵ The defense on right to detain the purchase money is then treated as in the nature of an action on the covenants, and is allowed to prevent circuitry of action.⁶ Where the purchaser bought without notice of an existing adverse title or incumbrance, and the consideration money has not been paid, he may defend himself in an action for the purchase money by showing that the title is defective or incumbered in whole or in part, and whether there

¹ *Tarpley v. Poage*, 2 Tex. 139; *Peck v. Hensley*, 20 id. 673; *Cooper v. Singleton*, 19 id. 260; *Woodward v. Rodgers*, 20 id. 176; *Cook v. Jackson*, id. 209.

² *Id.* See *Demarett v. Bennett*, 29 Tex. 262.

³ *Demarett v. Bennett*, *supra*; *Bryan v. Johnson*, 39 Tex. 31.

⁴ *Herron v. De Bard*, 24 Tex. 181.

⁵ *Youngman v. Linn*, 52 Pa. St. 413; *Wilson v. Cochran*, 46 id. 229.

⁶ *Id.*; *Morris v. Buckley*, 11 S. & R. 168; *Christy v. Reynolds*, 16 id. 258; *Tod v. Gallagher*, id. 261; *Ives v. Niles*, 5 Watts, 323; *Poyntell v. Spencer*, 6 Pa. St. 257.

are covenants or not. The rule in such case is the same after as before the execution of the deed.¹

The general principle is that a purchaser may defend himself from payment of the purchase money by reason of a clear defect or outstanding incumbrance, unless the intention was to run the risk of it; and of course there can be no such intention if the defect or incumbrance were unknown.² Where one party intended to convey, and the other expected to receive a good title, it is but equity that the purchaser should have relief in case of any defect of title, although there was no express agreement for that purpose; but where the intent was that the purchaser should run the risk of title, there is not a word to be said for him.³ Where, therefore, there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain.⁴ The defect being known and not provided for, the presumption is said to be irresistible, in the absence of an express stipulation, that the vendee relied on his own judgment as to the soundness of the title.⁵

In *Wilson v. Cochran*,⁶ Woodward, J., thus summarizes the Pennsylvania doctrine: "The detention of the purchase money on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence; but the principle is well settled with us, that where a vendor has conveyed with covenants on which he would be liable to the vendee in damages, for a defect of title, the vendee may detain the purchase money to the extent to which he would be entitled to recover damages upon the covenant, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the

¹ *Youngman v. Linn*, 52 Pa. St. 413.

² *Rawle on Cov. for Tit.* (4th ed.) 622, 623; *Steinhaur v. Witman*, 1 S. & R. 438; *Hart v. Porter*, 5 id. 201.

³ *Hart v. Porter*, supra.

⁴ *Lighty v. Short*, 3 Penn. 447;

Wilson v. Cochran, 46 Pa. St. 229;

Youngman v. Linn, supra.

⁵ *Smith v. Sillyman*, 3 Whart, 589;

Ross' Appeal, 9 Pa. St. 497.

⁶ 46 Pa. St. 231.

collateral advantages of the bargain. But where there is a covenant against a known defect, he shall not detain purchase money unless the covenant has been broken. If the covenant be for seizin, or against incumbrances, it is broken as soon as made, if a defect of title or an incumbrance exists; but if it be a covenant of warranty, it binds the grantor to defend the *possession* against every claimant of it by right, and is consequently a covenant against rightful eviction. To maintain an action for the breach of it, an eviction must be laid and proved, not necessarily by judicial process, or the application of physical force, but by the legal force of an irresistible title. There must be proof at the least of an involuntary loss of possession. And as the right to detain purchase money is in the nature of an action on the covenant, and is allowed to prevent circuity, the vendee who seeks to detain by virtue of a covenant of warranty is as much bound to prove an eviction as if he were plaintiff in an action of covenant. Until eviction the covenant is part of the consideration of the purchase money he agreed to pay, and holding the covenant he may not withhold the purchase money. But after eviction he has a right to have his damages deducted from the purchase money.”¹

If the defense is made on the ground of covenant broken, surrender of possession is not necessary;² but when, upon the equitable doctrine of this state, a purchaser seeks to resist the payment of the purchase money, where the covenant is not broken, and the purchase money is secured by mortgage on the premises and no personal demand is made on the purchaser, but merely asks, in default of payment of the purchase money, the restoration of the property conveyed, the purchaser must either pay the purchase money or restore the possession to the person from whom he received it.³ In such cases relief in this form is granted on the ground that eviction may take place; but say the court in one case:⁴ “This is very delicate ground on which to administer justice to vendors and vendees, for in deter-

¹ *Murphy v. Richardson*, 28 Pa. St. 288; *Rowland v. Miller*, 3 W. & S. 393.

² *Poyntell v. Spencer*, 6 Pa. St. 257; *Wilson v. Cochran*, *supra*.

³ *Rawle on Cov. for Tit.* (4th ed.) 643, 623, note 3; *Herzey v. Turbett*, 27 Pa. St. 424.

⁴ *Beaupland v. McKeen*, 28 Pa. St. 130.

mining the possibility of an eviction, we have not before us the paramount claimant on whose will and rights the liability to eviction depends. Possibly, he has no rights, as would appear the moment he attempted to assert them; or if he have rights it is possible he may never attempt to assert them; and in either case it would be against conscience and equity to allow the purchaser to keep the land, on which so unsubstantial a cloud rests, and the price also which he agreed to pay to the party who put him into possession."

CHAPTER IV.

VENDOR AND VENDEE — PERSONAL PROPERTY.

SECTION 1.

VENDOR AGAINST VENDEE.

Recovery on executed sales — Where only part of stipulated quantity delivered — For not accepting goods contracted for.

RECOVERY ON EXECUTED SALES.— Where there has been a delivery, or what is equivalent to it, of the property sold, or which the vendor is at liberty to treat as sold, and when the contract is thus so far executed that the title has passed to the vendee, the vendor is entitled to the price or value.¹ A sale or an agreement to sell may be valid though the price of the property be not named and fixed by the parties. Thus, it has been laid down by an elementary writer, that *express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten

¹ By the common law, a sale of personal property is usually termed a “bargain and sale of goods.” It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money*. Hence, it follows, that to constitute a valid sale, there must be a concurrence of the following requisites, viz.: 1st, parties competent to contract; 2d, mutual assent; 3d, a thing, the absolute or general property in which is transferred from the seller to the buyer; and 4th, a price in money paid or promised. Benj. on Sales, § 1. All that is required to give validity to a sale of personal property, whatever may be the amount or value, is the mutual assent of the parties to the contract. As soon as it is shown by any evidence, verbal or written, that it is

agreed by mutual assent that the one shall transfer the absolute property in the thing to the other for a money price, the contract is completely proven and binding on both parties. See *Lincoln v. Johnson*, 43 Vt. 74, 77. If, by the terms of the agreement, the property in the thing sold passes immediately to the buyer, the contract is termed in the common law “a bargain and sale of goods;” but if the property in the goods is to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions; as, for example, if it is necessary to weigh or measure what is sold out of the bulk belonging to the vendor, then the contract is called in the common law an executory agreement. Benj. on Sales, § 3.

loads of timber, or to pay a stated price for certain goods; *implied*, are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform: as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook, or contracted, to pay him as much as his labor deserves; as, if I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value.¹

A doubt was at one time expressed in an English case, whether, where the parties are altogether silent as to the price in an executory contract of purchase and sale, the law will supply the want of an agreement as to price, by inferring that the parties must have intended to sell and to buy at a reasonable price; but declaring that, undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendants, in order to prevent the injustice of the defendant taking the goods without paying for them.² This doubt, however, was removed by a decision soon afterwards in the same court. They say: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."³ The court also say: "A contract to furnish a cargo at a reasonable price, means such a price as the jury, upon the trial of the cause, shall, under all the circumstances, decide to be reasonable. This price may, or may not, agree with the current price of the commodity at the port of shipment, at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity or from various other causes."⁴ Where an order is sent to a merchant or manufacturer of goods in which he deals, silent as to price, and the order is accepted, the law fixes the

¹ 1 Black. Com. p. 443.

³ Hoadly v. McLaine, 10 Bing.

² Acebal v. Levy, 10 Bing. 376; 482.

Note 2 to Webber v. Tivil, 2 Saund.

⁴ Acebal v. Levy, *supra*.

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price at the current rate at which the goods are sold, and the party ordering is equally bound as though the price had been stated in the order. So, where an order is given for two articles mixed, to a manufacturer of such mixture, without specifying the proportion of each article, the manufacturer is empowered to compound the same in the usual manner in which the mixture is prepared for market, and the acceptance of the order makes a valid contract to that effect.¹ A personal delivery of goods by a dealer to a customer, or by any person, on request to another, is a transaction of the same nature, and there is a tacit agreement to pay the customary price or what the goods are reasonably worth.² The vendor is entitled to their value at the time of executing the order without reference to any subsequent rise in the value.³

Where, by a course of dealing of custom, there is one price for cash and another and larger price if credit is given, and a charge is made and the account presented in expectation of the payment at once, and it is not made, the value of the credit price may be recovered.⁴ If goods are delivered upon a special contract, and on examination are rejected as not conformable to it, but not returned to the vendor, he may recover their market value.⁵ So if property is paid on a contract which is afterwards rescinded, the value of the property so delivered, rather than the contract price of it, may be recovered.⁶

The parties may agree that the price may be fixed by a third person named by them. They are then as much bound

¹ *Konitzky v. Meyer*, 49 N. Y. 571; *Vickery v. Evans*, 16 Ind. 331.

² *Althouse v. Alvord*, 28 Wis. 517. In this case, Dixon, C. J., said: "The cost of the material out of which the article is made, . . . or, in other words, the profits arising to the vendor from the manufacture and sale, are matters quite foreign to the issue, where the manufactured article itself has a fixed and uniform market price or value. The purchaser must be presumed to have been familiar with such usual price or value, and to have bought with reference to it, and, therefore, will- ing to pay it. At all events, it

would be most unjust to the seller under such circumstances, there being no stipulation as to price, to require him to take less than he could have obtained elsewhere, or from other purchasers." *Henchley v. Hendrickson*, 5 McLean, 170; *Wells v. Abernathy*, 5 Conn. 223; *Burr v. Williams*, 23 Ark. 244.

³ *Hill v. Hill*, 1 N. J. L. 261; *Jenkins v. Richardson*, 6 J. J. Marsh. 541.

⁴ *Taylor v. Tucker*, 1 Ga. 231.

⁵ *Shields v. Pettie*, 4 N. Y. 122; *Terwilliger v. Knapp*, 3 E. D. Smith, 86; *Howard v. Hoey*, 23 Wend. 350.

⁶ *Camp v. Pulver*, 5 Denio, 48.

by the price he may fix, and it is as much a part of the contract as if fixed by the parties themselves.¹ Until the price is fixed, in such a case, the agreement to sell is incomplete.² But if the property has passed to the vendee, and he does any act to obstruct or render impossible the valuation in the mode agreed upon, the vendor will be entitled to recover the value estimated by the jury; as where the defendant agreed to buy goods at a valuation, and the valuers disagreed, and thereupon the defendant consumed the goods.³ So the parties may agree that a third person may decide any other fact upon which the identity, price or quantity depends; as to select, inspect, weigh or measure the commodity sold. The person whom they appoint for such purpose thereby becomes the agent of both parties, and his action in the matter for which he was appointed, honestly performed, will be conclusively binding upon the parties.⁴ If it does not appear that the person so employed acted corruptly, or made some gross mistake,⁵ in the absence of fraud, or anything tending to show unfairness on the part of the plaintiff in procuring the result, the action of the referee is mutually binding.⁶ Where mill logs were sold at a specified price per thousand feet, according to the quantity of lumber they should afterwards be estimated to make, and there was a table or scale of estimation then in such general use, that the parties were found by the jury to have referred to it as a rule for computing the quantity; it was held that the parties were bound by it, though it proved, in some respects, erroneous.⁷

¹ *Benj. on Sales*, § 87; *Brown v. Bellows*, 4 Pick. 189; *Cunningham v. Ashbrook*, 20 Mo. 553; *McCandlish v. Newman*, 22 Pa. St. 460; *Nutting v. Dickinson*, 8 Allen, 540.

² *Id.*; *Thurnell v. Balbirnie*, 2 M. & W. 786; *Cooper v. Shuttleworth*, 25 L. J. Ex. 114; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mer. 507.

³ *Clark v. Watson*, 18 C. B. 277; *Carter v. McNeeley*, 1 Ired. L. 448.

⁴ *President, etc. D. & H. Canal Co. v. Penn. Coal Co.* 50 N. Y. 250; *Savercool v. Farwell*, 17 Mich. 319;

Merrill v. Gore, 29 Me. 346; *McAndrews v. Santee*, 57 Barb. 193; *Oakes v. Moore*, 24 Me. 214.

⁵ *Robinson v. Fiske*, 24 Me. 401.

⁶ *McParlin v. Boynton*, 8 Hun, 449; *Newlan v. Dunham*, 60 Ill. 23. In this case the court say the decision of the referee cannot be affected by proof of mistake, but only by fraud. See *Chapman v. Dease*, 34 Mich. 375.

⁷ *Heald v. Cooper*, 8 Greenlf. 32. In this case *Parris, J.*, delivering the opinion of the court, said: "No mode is prescribed in the written contract by which this estimate is

Where a contract for the sale of hops provided for an inspection by one of the two vendors, or another mutually satisfactory, and the designated seller made the inspection, it was held an

to be made; and it is understood that, from the nature of the article to be delivered, the exact contents could not be ascertained until after the logs had been taken down the river and converted into boards. But it is alleged, on the part of the plaintiff, that this contract was entered into in reference to a usage or custom prevailing among log dealers on the K. river to ascertain the quantity of boards which may be made from a log or a lot of logs by a scale called the Brunswick scale; and it was submitted to the jury to determine whether, at the time of making the contract, that scale was in such general and exclusive use as that the parties, in making their contract, must be presumed to have had reference to it, and would expect to ascertain the number of feet of boards which the logs would make by that scale, and they found in the affirmative. This usage explains the intent of the parties; and not being in opposition to established principles of law, or a contradiction to the express terms of the written instrument, is deemed to form a part of the contract as much as though actually incorporated into it; or expressly referred to. *Williams v. Gilman*, 3 Greenlf. 276; 2 Stark. Ev. 453. . . . Considering that the jury have found the usage, and that the parties contracted in reference to such usage, they are bound by it, and the plaintiff is entitled to \$3 per thousand according to the scale, unless the defendants entered into the contract under such circumstances as will absolve them from

the whole or any part of it. They contend that the estimate by the Brunswick scale is erroneous; that its application to logs of the size of those delivered under this contract gives a larger quantity of boards than can be actually produced; and that the plaintiff is, therefore, not entitled to the benefit of that part of the contract growing out of the usage, but must be holden to the strict quantity, or, at farthest, to the estimate made by the Leonard scale, which is understood to be more exact in giving the quantity of boards to be produced from logs of the size of these, than the Brunswick scale. . . . The presumption from these facts (stated) is that the defendants knew the general size and quality of the logs they purchased, and also the scale by which they were to be estimated; and if they did not, that it was in consequence of a want of such diligence as the law presumes every man having a due regard to his own interests would be likely to use.

. . . "It is evident that a scale founded on general principles cannot, in its application, be equally exact in all cases. If a given per cent. is to be deducted, as waste, from the contents of the log, it is apparent that if the deduction be correct in a large log it cannot be so in a small one. But it is not found, certainly is not to be presumed, that the defendants, dealers in lumber as they are, could be ignorant of a fact so apparent and important to the interests of all persons engaged in the lumber business." See *Barker v. Roberts*, 8 Greenlf. 101.

essential prerequisite to the tender of the goods, and none the less conclusive for having been made by the party selling. The court say: "The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and, when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at and after performance. . . . And if it was only *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated."¹

An inspection and measurement of saw logs by a third person acting as the vendor's agent, had been made before the contract of sale, and the contract was based upon them, referring to and adopting such third person's scaling; it was held they do not thereby become of the same conclusive nature as when made after the contract, pursuant to employment by both parties, unless the vendee was fully acquainted with his qualifications.² Campbell, J., said: "If the parties had agreed on a sale before the logs were scaled, and had agreed that W should scale them, he would have been made their joint agent and arbiter, and it would be difficult to impeach any act of his, honestly done, for a mere mistake of judgment. But when these logs were measured, he was acting entirely as the agent of the vendors, and on their behalf. Under these circumstances, an offer to sell by his measurement already made, involves an assertion that he is in all respects a competent person, and that he has acted honestly. Nothing short of satisfactory evidence that the pur-

¹ *Dustan v. McAndrew*, 44 N. Y.

² *Ortman v. Green*, 26 Mich. 209.

chaser was fully acquainted with his qualifications would remove this burden from the vendor, who demands a sound price on the basis of his measurement. And where a person so employed, even by joint appointment, makes a mistake in a matter of fact, and not merely an error of judgment, there is no ground for holding that such mistake cannot be corrected. An erroneous assay of silver, or a mistaken count of bushels of grain, has been held to bind no one.¹ A material representation or assumption need not be fraudulent in fact, in order to authorize its correction."

To entitle the seller to recover the full value—either the contract or the market price,—the sale must be executed so as to pass the title to the purchaser; it must be at his risk, and he thus qualified to bring trover for it. Then, and not till then, an action either for goods sold and delivered, or bargained and sold, may be maintained; the former if there has been delivery, and the latter if there has not.²

The sale of a specific chattel passes the property in it to the vendee without delivery,³ and the risk of property which is the

¹ *Cox v. Prentice*, 3 M. & S. 344; *Wheadon v. Olds*, 20 Wend. 174.

² *Bailey v. Smith*, 43 N. H. 141; *Gordon v. Norris*, 49 id. 376; *Messer v. Woodman*, 22 id. 172; *Davis v. Hill*, 3 id. 382; *Ward v. Shaw*, 7 Wend. 404; *Outwater v. Dodge*, 7 Cow. 85; *Warren v. Buckminster*, 24 N. H. 336; *Fuller v. Bean*, 34 id. 290; *Newmarket Iron F. v. Harvey*, 23 id. 395; *Williams v. Jones*, 1 Bush, 621; *Sands v. Taylor*, 5 John. 395; *Pennemann v. Hartshorn*, 13 Mass. 87; *Macomber v. Parker*, 13 Pick. 175; *Hart v. Tyler*, 15 id. 171; *Atwood v. Lucas*, 53 Me. 508; *Atkinson v. Bell*, 8 B. & C. 277; *Elliot v. Pybus*, 10 Bing. 512; *Simmons v. Swift*, 5 B. & C. 857; *Goodall v. Shelton*, 2 H. Black. 316; *Hanson v. Meyer*, 6 East, 614; *Rhode v. Twaites*, 6 B. & C. 388; *Benj. on Sales*, § 765; *Nichols v. Morse*, 100 Mass. 523; *Morse v. Sherman*, 106

Mass. 430; *Dyer v. Libby*, 61 Me. 45; *Jenness v. Wendell*, 51 N. H. 63; *Spicers v. Harvey*, 9 R. I. 582; *Scotten v. Sutter*, 37 Mich. 526; *Phillips v. Meritt*, 2 U. C. C. P. 513.

³ *Dixon v. Yates*, 5 B. & Ad. 313, 340; *Simmons v. Swift*, 5 B. & C. 862; *Gilmour v. Sapple*, 11 Moore, P. C. 566; *Arnold v. Delano*, 4 Cush. 40; *Roper v. Lane*, 9 Allen, 502, 510; *Marble v. Moore*, 102 Mass. 443; *Hinde v. Whitehouse*, 7 East, 558; *Tarling v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Spartali v. Benecke*, 10 C. B. 212; *Calcutta Co. v. De Mottes*, 32 L. J. Q. B. 322; *Wood v. Bell*, 6 E. & B. 355; *Dailey v. Green*, 15 Pa. St. 118; *Webber v. Davis*, 44 Me. 147; *Kohl v. Lindley*, 39 Ill. 195; *Bailey v. Smith*, 43 N. H. 141; *Segerson v. Kohmann*, 39 Mo. 206; *Tome v. Du-bois*, 6 Wall. 548; *Dexter v. Norton*, 55 Barb. 272.

subject of a sale attends the title.¹ But where the sale is of goods generally, no property in them passes until there is a subsequent appropriation, according to the contract, of the goods to which it applies. Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, are equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.²

Where the contract, respecting specific property, requires certain acts to be performed upon the property itself, necessary to its completion, or for the ascertainment of what shall be paid for it, on the terms of the contract, or to place the property in another place for the benefit of the vendee, then whether the sale is complete and the title passes before the performance of these acts, depends on the intention of the parties. The authorities are not quite harmonious as to when, in such cases, the title does pass.³ If there are any conditions precedent they must of course be performed or waived.⁴ The title does not pass, and there is no right of action for the contract price, or for damages measured by the value of the subject of the sale, when the agreement is for the sale of goods generally, and there is in the con-

¹ Willis v. Willis, 6 Dana, 48; Dailey v. Green, 15 Pa. St. 118; Joyce v. Adams, 4 Seld. 296; Terry v. Wheeler, 25 N. Y. 520; Taylor v. Lapham, 13 Allen, 26.

² Dixon v. Yates, 5 B. & Ad. 313; Barrett v. Goddard, 3 Mason, 107; Hotchkiss v. Hunt, 49 Me. 213; Merrill v. Parker, 24 id. 89; Mears v. Williamson, 37 id. 556; Waldron v. Chase, id. 414; Page v. Carpenter, 10 N. H. 77; Felton v. Fuller, 29 id. 121; Willis v. Willis, 6 Dana, 48; Crawford v. Smith, 7 id. 59; Sweeny v. Ousley, 14 B. Mon. 413; Buffington v. Ulen, 7 Bush, 231; Martin v.

Adams, 104 Mass. 262; Merchants' Nat. Bk. v. Bangs, 102 id. 291; Thayer v. Lapham, 13 Allen, 28; Warden v. Marshall, 99 Mass. 305; Gardner v. Lane, 9 Allen, 498; Rice v. Codman, 1 id. 377; Bethel St. M. Co. v. Brown, 57 Me. 9; Dyer v. Libby, 61 id. 45. See Waldon v. Murdock, 23 Cal. 540; Russell v. Carrington, 42 N. Y. 118; Adams M. Co. v. Senter, 26 Mich. 73.

³ Benj. on Sales, Book II, ch. III; Lengham v. Eggleston, 27 Mich. 324; Hatch v. Fowler, 28 id. 205; Wilkinson v. Holliday, 33 id. 386; Chamblee v. McKenzie, 31 Ark. 155.

⁴ Id.

tract no identification of any particular goods, until such steps are taken afterwards by one or both of the parties in pursuance of the contract, as are necessary to the selection and appropriation of the specific property to the contract, unless there is a stipulation to pay while the contract is executory. When those steps have been taken the contract ceases to be executory; it becomes a complete bargain and sale, the title passes and the vendor is entitled to the price, equally as if the property so appropriated had been at the making described and identified in the contract.¹

Several cases in New York seem to affirm the right of a vendor to tender goods on an executory contract of sale, and sue for the contract price, though the contract did not give the vendor the right of selecting and appropriating the particular goods to the contract.² When articles are ordered to be manufactured, they are treated as the property of the vendee when

¹Crawford v. Earl, 38 Wis. 312; Thompson v. Alger, 12 Met. 428; Thorndike v. Locke, 98 Mass. 340; Bement v. Smith, 15 Wend. 493; Sands v. Taylor, 5 John. 395; Alexander v. Gardner, 1 Bing. N. C. 671; Gordon v. Norris, 49 N. H. 376; Jenness v. Wendell, 51 id. 63; Spicers v. Harvey, 9 R. I. 582; Scudder v. Worster, 11 Cush. 573; Browning v. Hamilton, 42 Ala. 484; Bailey v. Smith, 43 N. H. 141; Messer v. Woodman, 22 id. 172; Garland v. Lane, 46 id. 245; Woolsey v. Bailey, 27 id. 217; Macomber v. Parker, 13 Pick. 175; Putnam v. Tillotson, 13 Met. 517; Stanton v. Eager, 16 Pick. 467; Johnson v. Stoddard, 100 Mass. 306; Odell v. Boston & Me. R. R. 109 Mass. 50; Claflin v. Boston & Lowell R. R. Co. 7 Allen. 341; Ballentine v. Robinson, 46 Pa. St. 179; Dustan v. McAndrew, 44 N. Y. 72; Knewder v. Ellison, 47 id. 36; Rodgers v. Phillips, 40 id. 519; Torrey v. Corliss, 33 Me. 336; Barry v. Palmer, 19 id. 303; Dalton v. Solomonson, 3 B. & P. 582; Aldridge v. Johnson, 7 E. & B.

885; Brown v. Hare, 3 H. & N. 484; Fragono v. Long, 4 B. & C. 219; Elliott v. Pybus, 10 Bing. 512. In Lumpkin v. Crawford, 8 Ala. 153, it was held that a purchaser at sheriff sale is liable to an action by the sheriff, and the right to recover the full price cannot be controverted, if the sheriff at the time of the trial has the ability to deliver the thing purchased, or if it has been placed at the disposal of the purchaser by tender.

²Bridgeford v. Crocker, 60 N. Y. 627; Westfall v. Peacock, 63 Barb. 207. See Bagley v. Findlay, 82 Ill. 524. And see also McClure v. Williams, 5 Sneed, 718. In Dayton v. Rowland, 1 Daly, 446, it was held that where, by the custom of trade, a purchaser of goods on shipboard is bound to unload within a definite time, and by reason of the purchaser's failure to take the goods within that time, the owner is obliged to pay lighterage and storage fees thereon, the purchaser is liable for such payments.

made, and notice thereof given to the vendee with request to take them away. The vendor has then an immediate right of action for the price.¹ After goods are sold, it is the duty of the buyer to take away the goods bought within a reasonable time, and if he neglects to do so, the seller may charge for warehouse room, if prejudiced by the delay.² Where goods are sold to be paid for by bill or note, payable at a future day, and the bill or note is not given, general assumpsit for goods sold and delivered cannot be maintained until the credit has expired;³ but the vendor may sue at once on the special agreement, and recover the whole amount for which the bill or note should have been given, or the value of the goods.⁴ In a New York case, it was suggested that there should be a rebate of interest during the stipulated period of credit.⁵

WHERE ONLY PART OF STIPULATED QUANTITY DELIVERED.—Where an entire contract is made for the sale and delivery of personal property, either for a gross sum, or at a certain price per unit of its measure or weight, and such contract is only in part performed by the vendor, no action, of course, can be maintained on the contract for such part performance, and formerly there could be no recovery in any form;⁶ and that doctrine is still adhered to in some of the states.⁷ But a more just and equitable rule now generally prevails. If the vendee re-

¹ Higgins v. Murray, 4 Hare, 565; Bement v. Smith, 15 Wend. 493; Ballentine v. Robinson, 46 Pa. St. 179; Goddard v. Binney, 115 Mass. 450; Morse v. Sherman, 106 id. 430; Mixer v. Howarth, 21 Pick. 205.

² See Greaves v. Ashlin, 3 Camp. 426.

³ Dodge v. Waterman, 36 N. H. 186; Allen v. Ford, 19 Pick. 217; Yale v. Coddington, 21 Wend. 175; Scott v. Montague, 16 Vt. 164.

⁴ Hutchinson v. Reed, 3 Camp. 329; Mussen v. Price, 4 East, 147; Dutton v. Solomonson, 3 B. & P. 583; Haskins v. Duperoy, 9 East, 493; Adams v. Filer, 7 Wis. 306; Loring v. Gurney, 4 Pick. 16; Han-neman v. Grafton, 10 Met. 454;

Fuller v. Sweet, 30 Mich. 237; Barron v. Mullen, 21 Minn. 374; McCormick v. Basal, 46 Iowa, 235; Rhinehart v. Olwine, 5 W. & S. 157; Bisknell v. Buck, 58 Ind. 254; Stoddard v. Mix, 14 Conn. 12.

⁵ Hanna v. Mills, 21 Wend. 90.

⁶ 2 Kent's Com. 509.

⁷ Champlin v. Rowley, 18 Wend. 187; S. C. 13 id. 253; McMillan v. Vanderlip, 12 John. 165; Youngs v. Kent, 2 Sweeny, 257; Flanagan v. Demarest, 3 Robt. 183; Moses v. Bunker, 2 Sweeny, 248; McCormick v. Sarson, 1 id. 161; Currie v. White, id. 166; Keen v. Tupper, 33 N. Y. Sup'r Ct. 465; S. C. 53 N. Y. 550; Catlin v. Tobias, 26 N. Y. 217; Mead v. Degolyer, 16 Wend. 632; With-

tains the part delivered after the vendor has made default in respect to the residue, it is a severance of the contract, and the vendor is entitled to recover the contract price for what is so delivered and retained, subject to recoupment of such damages as the vendee sustains for non-performance of the entire contract,¹ or the value, subject to like counter-claim.²

The vendee may return the part delivered when delivery of the whole is due and not made, if he chooses; and if he retains it, it is deemed but just that he should make compensation for it; and the same rule applies to other contracts, namely, that the party who accepts and appropriates the benefit of a partial performance of a contract should pay therefor to the extent of the benefit; but has the right to damages for the other party's failure to perform in full.³ A contract for property, to be delivered in instalments, where each instalment is to be paid for separately, is not an entire contract. The vendor will be entitled to recover for any delivered instalment, irrespective of any default in the delivery of others.⁴

In contracts for future delivery of goods, to be subsequently or concurrently paid for, the delivery being a condition on the performance of which the right to payment depends, if the contract is entire, there must be a delivery of the whole to fulfil the condition.⁵ But where delivery is to be made in parcels or

erow v. Witherow, 16 Ohio, 238; Williams v. Sherman, 48 Barb. 402. See Leavenworth v. Packer, 52 Barb. 132.

¹ Bowker v. Hoyt, 18 Pick. 555; Smith v. Foster, 36 Vt. 705; Abbott v. Wyse, 15 Conn. 254; Horn v. Batchelder, 41 N. H. 86; Richard v. Shaw, 67 Ill. 222; Polhemus v. Heiman, 45 Cal. 573.

² Cole v. Swanston, 1 Cal. 51; Ruiz v. Norton, 4 id. 355; Clark v. Moore, 3 Mich. 55; Chapman v. Dease, 34 id. 375; Wilson v. Wager, 26 id. 452; Begale v. McKinzie, id. 470; Oxendale v. Witherell, 9 B. & C. 383; Cooke v. Munstone, 1 P. & B. N. R. 351; Reed v. Raun, 10 B. & C. 441.

³ Chapman v. Dease, 24 Mich. 375.

⁴ Loomis v. Eagle Bank, 10 Ohio St. 327; Moore v. Logan, 5 U. C. C. P. 294. See Seymour v. Davis, 2 Sandf. 230.

⁵ Howe v. Huntington, 15 Me. 350; Warren v. Wheeler, 21 id. 484; Howland v. Leach, 11 Pick. 151; Swan v. Drury, 22 id. 485; Dana v. King, 2 id. 155; Lord v. Belknap, 1 Cush. 279; Gazley v. Price, 16 John. 267; Williams v. Henley, 3 Denio, 363; Cornwall v. Haight, 8 Barb. 327; Champion v. Rowley, 18 Wend. 187; Jones v. Marsh, 22 Vt. 144; Shaw v. Turnpike Co. 2 Penn. 454; Smith v. Liscomb, 13 Tex. 532; Barber v. Willard, 4 McLean, 356; Grundy v. McClure, 2 Jones' L. 142; Hough v. Rawson, 17 Ill. 588; Rawson v. John-

instalments, severable not only in bulk, but prices and times of delivery, the delivery of each parcel is a condition only to payment *pro tanto*.¹ Nor will a default in respect to one severable part of the contract entitle the other party to rescind, unless there is then a renunciation of the entire contract, persisted in afterwards.²

Where the contract provides for a series of deliveries, and there is a renunciation of the contract by the seller, and a consequent default in respect to all or several of the deliveries, it has been held, where action was delayed until after the time stipulated for the last delivery, that the proper measure of damages is the sum of the differences between the contract and market prices on the days when the several deliveries were due.³ In *Burningham v. Smith*,⁴ the defendants entered into a contract with the plaintiff whereby they undertook to deliver from the 1st of January until the 31st of December, 1872, six thousand two hundred and sixty wagons of coal at 7s. 3d. per ton of two thousand pounds, at the fair average rate of twenty wagons per day; payment by three months' acceptance, drawn on the tenth of each month for the previous month's supply. The deliveries were irregular in point of time, and insufficient in point of quantity; they failed to comply with the condition that they should be at the fair average rate of twenty wagons per day. At the end of the year there was a large deficiency. The plaintiff, although constantly complaining of the deliveries, did not go into the market and buy against the defendant at any time during 1872, but on the 13th of February, 1873, he bought coal in the market to supply the whole deficiency of the coal undelivered, at a very much higher price, namely, 19s. per ton. Coal had been gradually rising in price in the market throughout the successive months of 1872, and it rose more rapidly in

son, 1 East, 203; *Jackson v. Allaway*, 6 M. & Gr. 942; *Boyd v. Lite*, 1 C. B. 222; *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowen*, L. R. 1 C. P. 484.

¹ *Brown v. Muller*, L. R. 7 Ex. 319. See *Deming v. Kemp*, 4 Sandf. 147; *Seymour v. Davis*, 2 Sandf. 239.

² *Roper v. Johnson*, L. R. 8 C. P.

167; *Withers v. Reynolds*, 2 B. & Ad. 882; *Smoot's Case*, 15 Wall. 36; *Simpson v. Crippen*, L. R. 8 Q. B. 14; *Frost v. Knight*, L. R. 5 Ex. 322; *Burtis v. Thompson*, 42 N. Y. 246. See *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

³ *Brown v. Muller*, L. R. 7 Ex. 319.

⁴ 31 L. T. N. S. 540.

the months of January and February, 1873. The plaintiff claimed to be entitled to, as damages, the difference between the contract price of 7s. 3*d.* and the market price at the expiration of such a reasonable time after the 31st of December, 1872, as would have enabled him to go into the market and obtain it, calculated upon the whole deficiency left undelivered by the defendants throughout the year 1872. The defendants contended that the plaintiff was not entitled to wait until the expiration of the year before assessing his damages—that a breach was committed as often as a month expired without the proper quantity applicable to such month having been delivered, and that the plaintiff was bound to assess his damages in respect of such breach from an estimate of that month's market price; or that the breaches were committed at some shorter periods, but that the damages should be calculated at the end of each month. It was held that as soon as the defendants failed to deliver a fair average of coal according to the terms of a contract, a breach had taken place, for which at that time the plaintiff was entitled to damages, as upon that breach, and so on from time to time, to the last; that it was an erroneous way of estimating the damages, by waiting until the full period of the contract had expired, and then claiming the difference at that time.¹

FOR NOT ACCEPTING GOODS CONTRACTED FOR.—An executory agreement which requires a subsequent acceptance of the property by the buyer to consummate the sale, does not become a complete bargain and sale so as to vest the title in him, if he refuses to take the goods. In such case the vendor is entitled to recover damages only to the extent of his actual injury from the failure of the vendee to fulfil his contract,² which is ordinarily the difference between the contract price and the market value at the time and place of the breach, with interest.³ This

¹See *Tyers v. Rosedale, etc. Co.* L. R. 8 Ex. 305.

²*Allen v. Jarvis*, 20 Conn. 38; *Dana v. Fiedler*, 12 N. Y. 48; *Houston, etc. R. R. Co. v. Mitchell*, 38 Tex. 85; *Robinson v. Varnell*, 16 id. 382.

³*Id.*; *Girard v. Taggart*, 5 S. & R. 19, 539; *Davis v. Adams*, 18 Ala. 264; *Clement, etc. Manuf. Co. v. Meserole*, 117 Mass. 362; *Danforth v. Walker*, 37 Vt. 239; *Beals v. Terzy*, 2 Sandf. 127; *Whitmore v. Coats*, 14 Mo. 9; *Rand v. White*

may be ascertained and fixed by a resale within a reasonable time, and after notice to the vendee of the vendor's intention to resell, taking all proper measures to secure as fair and favorable a sale as possible.¹ Such resale is made on the theory that the property is that of the vendee retained by the vendor as a means of realizing the contract price; he acts as the agent of the vendee, and deducts from the proceeds all the expenses incurred.² After notice of the vendor's intention to resell, no notice of the time and place of the resale is required to be given, but it must be made according to the usage of trade.³

Mts. R. R. Co. 40 N. H. 79; Andrews v. Hoover, 8 Watts, 239; Ganson v. Madigan, 13 Wis. 67; Rider v. Kelly, 32 Vt. 268; Weltner v. Riggs, 3 W. Va. 445; Pickering v. Bardwell, 21 Wis. 562; Hale v. Trout, 35 Cal. 229; Dustan v. McAndrew, 44 N. Y. 72; Lewis v. Greider, 49 Barb. 606; 51 N. Y. 231; Pollen v. LeRoy, 10 Bosw. 38; 30 N. Y. 549; Bridgeford v. Crocker, 60 N. Y. 627; Mettler v. Moore, 1 Blackf. 342; Lucas v. Heaton, 1 Ind. 264; Ellison v. Dove, 8 Blackf. 571; Zehner v. Dale, 25 Ind. 433; Williams v. Jones, 12 id. 561; Young v. Merton, 27 Md. 114; Hall v. Pierce, 4 W. Va. 107; Springer v. Berry, 47 Me. 330; Hall v. O'Hanlan, 1 Brev. 471; Clifton v. Newson, 1 Jones' L. 108; Haskell v. McHenry, 4 Cal. 411; Nixon v. Nixon, 21 Ohio St. 114; Barr v. Logan, 5 Harr. (Del.) 52; Hewitt v. Miller, 61 Barb. 567; Rickey v. Tenbroeck, 63 Mo. 563; McNaughten v. Cassally, 4 McLean, 530; Chapman v. Cochran, 30 Wis. 295; Marshall v. Piles, 3 Bush, 249; Camp v. Hamlin, 55 Ga. 259; Sanborn v. Benedict, 78 Ill. 309; Pittsburgh, etc. R. R. Co. v. Heck, 50 Ind. 303; Schnebly v. Shirthiff, 7 Phil. 236; Hall v. Pierce, 4 W. Va. 107; McNaught v. Dodson, 49 Ill. 446; Gibbons v. U. S. 8 Wall. 269.

¹ Whitney v. Boardman, 118 Mass.

242; McEachron v. Randles, 34 Barb. 301; Williams v. Godwin, 4 Sneed, 558; Rickey v. Tenbroeck, 63 Mo. 563; Saladin v. Mitchell, 45 Ill. 79; Barr v. Logan, 5 Harr. (Del.) 52; Pollen v. LeRoy, 30 N. Y. 549; Cook v. Brandies, 3 Met. (Ky.) 555; Dustan v. McAndrew, 44 N. Y. 72; McClure v. Williams, 5 Sneed, 718; Jackson v. Covert, 5 Wend. 139; Young v. Mertens, 27 Md. 114; Hall v. O'Hanlan, 1 Brev. 471; Lewis v. Greider, 49 Barb. 606; Lumpkin v. Crawford, 8 Ala. 153; Camp v. Hamlin, 55 Ga. 259; Ullman v. Kent, 60 Ill. 271; Hughes' Case, 4 Ct. Claims, 64; Bell v. Offat, 10 Bush, 632; Van Horn v. Rucker, 33 Mo. 391.

² Pollen v. LeRoy, 30 N. Y. 549; Dustan v. McAndrew, 44 N. Y. 72; Westfall v. Peacock, 63 Barb. 209; Crooke v. Moore, 1 Sandf. 297; Bagley v. Findlay, 82 Ill. 524; Young v. Mertens, 27 Md. 114.

³ Id. In Hiecock v. Hoyt, 33 Conn. 553, it was held that where the title to property passes by a sale, and the vendor retains the possession as security for the purchase money, and finally sells to other parties for a less price, and seeks to recover the difference from the first purchaser, it is necessary that specific notice of the time and place of sale should be given.

But in a case where the contract

If the net proceeds of the trade are less than the contract price, he may recover by action on the contract the deficiency.¹ The vendor may, if necessary, transport the goods to another place at the expense of the vendee, for a market.² The place of resale is not necessarily restricted to the place where by the contract the vendees were bound to receive the property; the vendor is authorized to exercise a reasonable discretion as to the place of sale, and may also, at the expense of the vendee, insure the property.³

In some cases, when the market price was declining, the vendee has given notice of his refusal to complete the agreement in advance of the time fixed by the contract for acceptance of the goods, with a view to having the damages estimated with reference to the market value at the date of such notice. Where the goods were to be delivered as soon as vessels could be obtained for their transportation to a specified place, and such notice was given while the goods were at sea, it was held that the true rule was the difference between the contract price, and the value on the day the goods were offered at the designated place.⁴

The paramount principle limiting recovery to actual injury will enable a vendee, by notice that he will decline further deliveries given in advance, to impose on the vendor the duty to reasonably conduct his affairs so as to lessen damages; and to the extent that damages can thus be avoided the vendee will be relieved from liability.⁵ Thus, where the defendant contracted with the plaintiff for a quantity of potatoes to be delivered

is executory, no such notice is necessary.

¹Id.; *Springer v. Berry*, 47 Me. 330; *Williams v. Godwin*, 4 Sneed, 557; *Barr v. Logan*, 5 Harr. (Del.) 52; *Hall v. O'Hanlan*, 1 Brev. 471; *Jackson v. Covert*, 5 Wend. 139; *Boorman v. Nash*, 9 B. & C. 145; *MacLean v. Dunn*, 4 Bing. 722; *Sands v. Taylor*, 5 John. 395; *McClure v. Williams*, 5 Sneed, 718.

²*Jackson v. Covert*, 5 Wend. 139; *Lewis v. Greider*, 51 N. Y. 231; S.

C. 49 Barb. 606. But see *Chapman v. Cochran*, 30 Wis. 295.

³*Lewis v. Greider*, supra.

⁴*Phillpott v. Evans*, 5 M. & W. 475. See *Stewart v. Canty*, 8 M. & W. 160; *Boormann v. Nash*, 9 B. & C. 145; *Cort v. Ambergate*, etc. R'y Co. 17 Q. B. 127; *Ripley v. McClure*, 4 Ex. 345; *Reid v. Haskins*, 6 E. & B. 953; *Clement & H. M. Co. v. Meserole*, 107 Mass. 362; *Smith v. Lewis*, 25 Conn. 624; *Haines v. Tucker*, 50 N. H. 307.

⁵See vol. I, p. 148.

during the ensuing winter, as called for by the defendant, and before they were all purchased by the plaintiff, the defendant notified him not to purchase any more until further advices, it was held that this order was not a rescission of the contract, but a refusal to receive any more than the potatoes already purchased, and that the measure of damages as to the residue to be purchased when the direction was received was the difference between the price the defendant had stipulated to pay, and what it would cost the plaintiff to procure and deliver the potatoes according to the contract. The general principle was stated, that in executory contracts a party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped at that point or stage in the execution of the contract.¹ The vendor in that case had no right, after receiving the direction to buy no more, to proceed with his purchases, and afterwards recover for loss sustained on the potatoes by frost and rot. His damages as to such after-purchases must be limited to the difference between the agreed price, and what it would cost the plaintiff to procure and deliver them.² So where an article has been ordered of a manufacturer at a specified price, and work has been done and materials used in its construction; but, before the completion of the article, the order is countermanded, the materials remaining in the manufacturer's hands, he was not allowed to recover on the common counts the value of such labor and materials; it was held that he should sue on the special contract and claim his damages for the breach, or for being wrongfully prevented from performing it. In such a case the defendant has no interest in the materials, and no concern with the amount of labor; the plaintiff's labor is upon his own materials to increase their value for the purpose of effecting a sale to the defendant of the article ordered when completed. The law, however, will not compel the plaintiff, after such countermand, to go on and complete the article ordered before he can recover pay for what he has done, but he may treat the countermand and refusal as a prevention of performance on his part, and sue upon the con-

¹ Danforth v. Walker, 37 Vt. 239.

² Danforth v. Walker, 40 Vt. 357.

tract on that ground. The value of the labor expended on the materials is not the proper criterion of the damages; for it may have enhanced their value to the plaintiff; if so, he is to that extent compensated for his labor; but it may have diminished their value; and in that event payment for the labor will not be adequate compensation. Whether the labor has enhanced or diminished the value of the materials is a question of fact for the jury in estimating the damages.¹

The recovery of damages by a vendor against a vendee, for not accepting and paying for goods contracted for, proceeds on the ground that the former has been ready to do his part, and has offered performance of the precedent or concurrent condition of delivering goods which will answer the requirements of the contract—in all respects—in time, quality and quantity, and confer a good title.² A want of punctuality may be waived by accepting for inspection of quality after the date fixed for delivery,³ and afterwards rejecting the goods on other grounds. In a contract for the sale of goods by sample, the seller agrees to deliver, and the buyer to accept, goods of the same kind and quality as the sample. The identity of the goods sold in kind, condition and quality with the sample, is of the essence of the contract.⁴ In such cases, it is the privilege of the vendee to return the goods and decline them if they are found not to correspond with the sample.⁵ Where the vendor delivers property on an executory contract, which requires a particular quality or description, and the vendee has not had an opportunity to examine it, he may receive and retain it sufficiently long to make a fair examination, and, if found substantially inferior to the property described in the contract, he may, within a reasonable time, return it to the vendor and refuse to accept it.⁶

¹ *Hosmer v. Wilson*, 7 Mich. 294.
See *Chicago v. Greer*, 9 Wall. 726.

² *Kirkpatrick v. Alexander*, 44 Ind. 595; *Baker v. Higgins*, 21 N. Y. 397; *Newberry v. Furnival*, 46 How. Pr. 139; *Byers v. Bonsall*, 3 Pittsb. 482; *Bell v. Offutt*, 10 Bush, 632.

³ *Newberry v. Furnival*, 46 How. Pr. 139.

⁴ *Gunther v. Atwell*, 19 Md. 157;
Young v. Cole, 3 Bing. N. C. 724;

Mondel v. Steel, 9 M. & W. 858, 871;
Beirne v. Dord, 1 Seld. 95; *Hargous v. Stone*, id. 73; *Waring v. Mason*, 18 Wend. 425; 1 *Smith's Lead. Cas.* 5th ed. 256 et seq.

⁵ *Id.*: *Fald v. Kinnear*, 4 Kan. 476; *Beebee v. Robert*, 12 Wend. 413; *Brantley v. Thomas*, 22 Tex. 270; *Bradford v. Manly*, 13 Mass. 139.

⁶ *Wolf v. Deitsch*, 75 Ill. 205;

He may decline to receive it if not conformable to the contract, by being superior to or otherwise different from the goods described in the contract.¹ If the vendee fails to give notice to the vendor within a reasonable time that he declines to receive the goods because not conformable to the contract; or if he exercises ownership over them, as by selling a part of them, he cannot afterwards repudiate the contract, or refuse the goods.²

If the goods sent upon a contract or order, when received, are found to be inferior, or otherwise not conformable to the contract, and the vendee rejects them after having paid freight, or incurred other expenses in obtaining the temporary possession, he has a claim on the vendor for reimbursement.³

Haase v. Nonnemacher, 21 Minn. 486; *Knoblauch v. Kronschnabel*, 18 id. 300; *Cohen v. Platt*, 40 N. Y. Supr. Ct. 483; *Neaffe v. Hart*, 4 Lans. 4.

¹*Newmarket Iron F. v. Harvey*, 23 N. H. 395.

²*Watkins v. Paine*, 57 Ga. 50; *Wolf v. Deitsch*, 75 Ill. 205. In *Kidd v. Belden*, 29 Barb. 266, it appeared that the plaintiff had manufactured and put into the defendant's steamboat a boiler, engines and other machinery, under a contract by which he was to be paid a certain specified price, a portion of which was to be secured by a chattel mortgage upon the property, to be executed by the defendant when the plaintiff had completed his contract. After the engine and boiler had been placed and partially fastened in the boat, but before the work was completed, or ready to be delivered, the defendant clandestinely went off with the boat to Canada, and, on his return, refused either to execute the chattel mortgage, or to pay for the machinery, or permit the plaintiff to remove it. In replevin by the plaintiff, the jury having found that there had been no absolute and unconditional delivery of the machinery to defendant, nor such an annexa-

tion of it to the boat that it could not be removed without injury to the boat, it was held that plaintiff had not lost his title to the property, but might maintain the action.

It was also held that in estimating the damage the plaintiff had sustained the jury were to be governed by the value of the machinery as established by the parties in their contract, so far as it could be applied; and that the value of the property was to be assessed in the condition it was at the time of the demand.

The defendant was not permitted to show, in mitigation of damages, that the machinery was not placed in the boat in a workmanlike manner. He was concluded, by his election, to take the work in its unfinished condition, and must be held to have accepted the job as finished, and to have waived all objection on account of defects. It was held that the defendant could not be allowed to show, in mitigation of damages, what would be the value of the machinery detached from the boat. The plaintiff's labor in putting the machinery into the boat entered into and formed part of the value to be assessed by the jury.

³See *Barnett v. Terry*, 42 Ga. 283.

SECTION 2.

VENDEE AGAINST VENDOR.

Recovery for non-delivery of property contracted for — Proof of value — Rule in favor of vendor when delivery becomes impossible — Rule where the purchase price has been paid — Contracts for the delivery of stocks — Contracts to pay in or to deliver specific articles — Consequential damages on contracts of sale — On warranties — Defense to actions for purchase money.

RECOVERY FOR NON-DELIVERY OF PROPERTY CONTRACTED FOR.—
The breach of contract now to be considered is that of a vendor who has violated his executory agreement to sell goods or property of a personal nature by not delivering. The same rule or measure of damages will apply where there is a sale of specific property and the vendor subsequently refuses to deliver it. The general rule is, where payment and delivery are concurrent acts, and the vendor refuses to deliver, that the vendee is entitled to recover, as damages, the difference between the contract price and the market value of the goods at the time and place appointed for delivery, and interest.¹

¹ Bush v. Holmes, 53 Me. 417; Furlong v. Polleys, 30 id. 491; Smith v. Berry, 18 id. 122; Warren v. Wheeler, 21 id. 484; Berry v. Dwinell, 44 id. 255; Randon v. Burton, 4 Tex. 289; Kemp v. Knickerbocker Ice Co. 51 How. Pr. 31; Norton v. Wales, 1 Robt. 561; Williamson v. Dillon, 1 H. & G. 444; Duncan v. McMahon, 18 Tex. 597; Fessler v. Love, 48 Pa. St. 407; Gilpin v. Consequa, 3 Wash. C. C. 184; Kipp v. Wiles, 3 Sandf. 585; Bartlett v. Blanchard, 13 Gray, 429; Clark v. Pinney, 7 Cow. 681; Currie v. White, 7 Robt. 637; Northrup v. Cook, 39 Mo. 208; Somers v. Wright, 115 Mass. 292; Worthen v. Wilmot, 30 Vt. 555; Doak v. Snapp, 1 Cold. 180; Blackwood v. Brennan, 1 Harp. 144; Hinde v. Liddell, 32 L. T. N. S. 449; L. R. 10 Q. B. 265; Paine v. Sherwood, 21 Minn. 225; Miles v. Miller, 12 Bush, 134; Giles

v. Morrison, 50 Barb. 50; Yorke v. Von Planck, 65 id. 316; Brown v. Muller, L. R. 7 Exch. 319; Pendergast v. Reed, 29 Md. 398; Camp v. Hamlin, 55 Ga. 259; Dana v. Fiedler, 12 N. Y. 40; Watrous v. Bates, 5 U. C. C. P. 366; Baker v. John, 2 Robt. 570; Woodworth v. Curtis, 7 Wend. 112; Ruiz v. Norton, 4 Cal. 355; Crosby v. Watkins, 12 id. 85; Burnham v. Roberts, 70 Ill. 19; Davis v. Shields, 24 Wend. 322; Sanborn v. Benedict, 78 Ill. 309; Duncan v. Post, 3 Cal. 373; Pittsburgh, etc. Co. v. Hick, 50 Ind. 303; Harrolson v. Stein, 50 Ala. 347; Hill v. Smith, 32 Vt. 433; Hamilton v. Gangard, 34 Barb. 204; Parsons v. Sutton, 66 N. Y. 92; Stewart v. Power, 12 Kan. 596; Boies v. Vincent, 24 Iowa, 387; Clark v. Daley, 20 Barb. 42; Havemeyer v. Cunningham, 35 Barb. 515; Brent v. Richards, 2 Gratt. 539; Meserve v.

If the contract is for a cargo, or for all the goods of a specified description in a given vessel, the vendee is not entitled to recover damages on the basis of what the goods are worth in broken parcels.¹ Nor will this general standard of damages be departed from though one or both of the parties were mistaken in respect to material facts affecting the market price. Thus, in an action against a vendor for not delivering goods, the court say: "The relation of buyer and seller is not a confidential one, and each of the parties is supposed to judge of his ability to perform his part for himself;" that declarations of the plaintiff that he knew at the time of making the contract that the article contracted for could not be procured, could not be given in evidence in mitigation of damages. A contract to perform an impossible thing may be void; but it is never impossible to procure and deliver an article of commerce which may be had in the market in some quarter of the world.² So, where alcohol was contracted to be delivered on board a vessel under the tax law from August 20th to August 31st, 1862, duty paid at a fixed price, the subsequent suspension, until after the time fixed for delivery, of an act of congress, which practically rendered alcohol sold for exportation duty free, did not relieve the vendor from the obligation to make delivery according to his contract, although such suspension of the act was not contemplated by the parties.³ But where goods are sold in close packages, and

Ammidon, 109 Mass. 415; Shepherd v. Hampton, 3 Wheat. 200; Fishill v. Winans, 38 Barb. 228; Dey v. Dox, 9 Wend. 129; Gregory v. McDowell, 8 id. 435; Harris v. Rodgers, 6 Heisk. 626; Boorman v. Nash, 9 B. & C. 145; Barrow v. Arnaud, 8 Q. B. 604; Vapley v. Oakeley, 16 id. 941; Josling v. Irvine, 6 H. & N. 512; Chinery v. Viall, 5 H. & N. 288; Griffiths v. Perry, 1 E. & E. 680; Peterson v. Ayre, 13 C. B. 353; Donald v. Hodge, 5 Hayw. 85; Connell v. McClean, 6 Harr. & J. 297; Kitzinger v. Sanborn, 70 Ill. 146; Nilson v. Lancashire, etc. Ry. Co. 9 C. B. N. S. 632; Orr v. Bigelow, 14 N. Y. 556; Stanton v. Small, 3 Sandf. 230;

Beales v. Terry, 2 id. 127; Lattin v. Davis, Hill & Denio, 9; Bailey v. Clay, 4 Rand. 346; Mallory v. Lord, 29 Barb. 454; Cahen v. Platt, 69 N. Y. 348; Bracket v. McNair, 14 John. 170; Gordon v. Norris, 49 N. H. 376; Stevens v. Lyford, 7 id. 360; West v. Pritchard, 19 Conn. 212; Shaw v. Nudd, 8 Pick. 9; Bartlett v. Blanchard, 13 Gray, 429; Quarles v. George, 23 Pick. 400; Worthen v. Wilmot, 30 Vt. 555; Davis v. Richardson, 1 Bay, 105; Whitmore v. Coates, 14 Mo. 9. See Harrison v. Charlton, 37 Iowa, 134.

¹ Duncan v. Post, 3 Cal. 373.

² Myers v. Drake, 10 Watts, 110.

³ Baker v. Johnson, 2 Robt. 570.

there is a mutual mistake of the parties as to the quantity, it will be corrected in an action between them on the basis of the purchase price.¹

If a purchaser for a price below the market agrees that should he desire to sell the property he will sell it back to his vendor at the same price, and afterwards sells to another for more than the market price, he will be liable on his agreement for the difference between the amount he paid and the sum he sold for.² This rule of damages, the difference between the contract and the market price, is founded on the consideration that the articles withheld are worth the market price to the vendor, and the vendee may immediately, after the breach of the contract, go into the market and supply himself with the goods at the market price, and, having done so, he is in as good condition as if the contract had been performed.³

The agreement may relate to property which may not be found in the market, and can only be produced at an expense greatly above the contract price. In such a case, it has been held that if the course pursued by the purchaser in obtaining other like property, as timber for example, was the only way it could be obtained; or was a reasonable and prudent way of obtaining it, irrespective of any special use or exigence, the difference between the contract price and the higher cost of the property thus obtained may be recovered by the purchaser, as damages naturally arising from the breach itself.⁴ The recov-

¹ Hargous v. Ablow, 3 Denio, 406.

² Brent v. Richards, 2 Gratt. 539; Duncan v. McMahon, 18 Tex. 597.

³ Frink v. Tatman, 36 Ind. 259; Beard v. Straw, 38 id. 128; Dana v. Fiedler, 12 N. Y. 40; Furlong v. Polleys, 30 Me. 493; Deere v. Lewis, 51 Ill. 254; Brandt v. Bowlby, 2 B. & Ad. 932. See Alden v. Keighley, 15 M. & W. 117. An instruction to the jury in an action for breach of a contract to sell and deliver lumber, that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery, is erroneous.

The true measure of damages is the difference between the contract price and what it would have cost the plaintiff to procure at the place of delivery, and at the time or times when it was reasonable and proper to supply themselves, lumber of the kind and quantity they were to receive on the contract; and, if it were impracticable for them thus to supply themselves, except at retail rates, they were entitled to demand those rates of the defendants. Haskell v. Hunter, 23 Mich. 305.

⁴ Paine v. Sherwood, 21 Minn. 225; S. C. 19 id. 215; Hinde v. Liddell, L. R. 10 Q. B. 265.

ery is governed by the market price, if there be one, although it may be enhanced by the fact that the article is patented, and the right to sell held exclusively by the party agreeing to sell. The vendee has a right to the benefit of the patent in whatever degree it entered into the market value of the article.¹

Where goods which cannot be procured in the market are sold to be delivered on a day certain, the purchaser is entitled to recover, in an action for breach of the contract, the amount which he has reasonably expended to avert the loss which he would otherwise have sustained from the non-delivery.² Thus, where the defendant had contracted to supply to the plaintiff 2,000 pieces of gray shirting, to be delivered on the 20th day of October certain, at so much per piece, and was informed that the purchase was intended for shipment, and shortly before the 20th of October notified the plaintiff that he would not be able to complete his contract, whereupon the plaintiff endeavored to get the shirting elsewhere, but, being unable to do so, in order to ship according to his contract with his sub-vendee, procured 2,000 pieces of other shirting of a somewhat superior quality, at an increase of price; the sub-vendee, having accepted the substitute, but paying no advance in price to the plaintiff, he sued to recover against the defendant, for the breach of his contract, this difference between what he paid for the substituted shirting and the price contracted to be paid to the defendant. It appeared that the shirting which the plaintiff bought was the nearest in quality and price that could be got by the 20th of October, and it was held that, there being no market for the article contracted for, the measure of damages was the value at the time of the breach, and that the plaintiff, having done the best thing he could, was entitled to recover the difference in the price.³ In *Barker v. Mann*,⁴ after sale of specific goods, the vendors refused to make delivery, and gave immediate notice to the vendee to that effect. The court say, by Williams, C. J.: "In this case the appellants promptly informed the appellees of their intention to abandon the sale, and there is no reason assigned or appearing why they could not

¹ *Frink v. Tutman*, 36 Ind. 259.

265; *Haskell v. Hunter*, 23 Mich. 305.

² Vol. 1, p. 151.

³ *Hinde v. Liddell*, L. R. 10 Q. B.

⁴ 5 Bush, 672.

procure a supply of the same articles within a few days from other vendors in the L market [where the transaction took place]. Had they done so, their necessary expense, together with their time and trouble, and any possible advance in the price of such goods at L which they would have had to pay, should be regarded as elements making up their damages.¹”

The jury cannot give damages beyond the market value, though the refusal to deliver may have been made with a view to profit.² But it is said if the price was not fixed, and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate, according to the conduct of the defendant.³ Hopkinson, J., vindicating this rule, upon a motion for a new trial for excessive damages, said: “In assessing the damages for the breach of a contract [for the sale and delivery of coffee], the law has established a rule for both the court and jury, which, if it may fail sometimes to do exact justice in a particular case, affords generally as equitable and reasonable a rule as could be given. The damage to be recovered is to be governed by the *price* of the article at the time when it should have been delivered, compared with the contract price. This rule is founded on an hypothesis, not always true in fact, perhaps not often so, and very favorable to the plaintiff; that is, that he would certainly have sold the article, if he had received it, at the advance of that day, and not have retained it, subject to the contingency of a depression. It is also true, on the other hand, that he must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value. Before we inquire, from the evidence, what was the price of the coffee on the day the defendant was bound to deliver this parcel to the plaintiff, we must settle the true meaning or interpretation of the rule; what is intended by the *price* of the article? On the one side it is contended that the plaintiff is entitled to recover so much money from the defendant as on that day would have enabled him to purchase the coffee; to make good the contract, and put into his posses-

¹ See Taylor v. Reed, 4 Paige, 561; 331. See Grand Tower Co. v. Phillips, 23 Wall. 471.
 Feehon v. Hallenan, 13 U. C. Q. B. 440.

³ Id.

² Blydenburgh v. Welsh, 1 Baldw.

sion the article the defendant had contracted to deliver to him; in short, to compel against him a specific performance of his contract. We do not inquire whether there would be anything unjust in this rule — anything of which any one has a right to complain who has broken his engagements. But, is this the rule which the law has adopted? Does it not introduce a new rule and a new principle into such cases? It is the price — the *market price* of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the *value* — the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which, if true, would augment its value, may suspend the sale, or put a price upon it, not according to its value, in the *actual* state of the market, or the actual circumstances which affect the market; but, according to what, in their opinion, will be its market price or value, provided the rumor prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages, is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance. The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter.

“With this explanation of the rule which prescribes the market price of the article on the day of delivery, we must examine whether the jury in this case have exceeded it clearly in the verdict which they have rendered. It is conceded by both parties that they have calculated the coffee which the defendant was bound to deliver to the plaintiff, on the 14th of April,

1825, at nineteen and three-fourths cents a pound. Does the evidence support this calculation or estimate for such coffee, on so large a quantity on that day? Was this the buying or selling price? We feel, as the jury probably did, no inclination to force the testimony in favor of the defendant; on the contrary, his unaccounted for and unaccountable conduct in this affair; the carelessness, to say nothing more harsh of it, with which he disregarded a deliberate, and to him, a profitable contract, was calculated to induce the jury to go all allowable lengths against him. The reason he gave for refusing to perform his bargain with the plaintiff has been given upon the trial, and never had any solid foundation even in his own opinion. The ground taken for his justification or apology here, so far as appears by the evidence, did not occur to him at the time of the transaction, and of course formed no part of his motive or reason for receding from his engagement. Unwilling to impute to [the vendor] a sordid design, we confess ourselves unable to discover the cause of his departure from the course it was so obviously his duty to pursue. If such considerations have influenced the jury, and very naturally too, in making up their verdict, we must not allow them to affect our judgment of the law of the case, and the application of it to the evidence. Juries may sometimes yield honestly to excitements, which judges must not feel. To correct such errors is a prominent use of the calm review of a case on a motion for a new trial. The question of market value is one so peculiarly proper for the decision of a jury, that we would not oppose ourselves to their opinion upon it, unless where we were assured that they have either mistaken the rule of law, or contradicted the clear purport of the evidence. We inquire, then, have the jury erred on this point, and given to the plaintiff a higher rate of damages than he is entitled to; that is, have they estimated the coffee, which was the subject of the contract, at a greater value than it had in the market on the 14th of April, 1825? . . .

“There was a sudden and considerable excitement in the coffee market on the 7th, founded on circumstances and expectations which were not afterwards confirmed; and no sales were made from that day to the 14th, inclusive, which, in our minds, shows there was not such an advance as would have raised the

value of this coffee to the price at which it has been estimated by the jury. Whatever prices the holders may have asked, no one was willing to give them. . . . It is enough that we think the jury have so far overrated the value of this coffee, as to support the objection of excessive damages to their verdict. It is not unlikely that they may have not exactly understood what was the meaning of the court in instructing them in the range they might take between the lowest and the highest price, as they might deem the refusal of the defendant to perform his contract to be wilful or inadvertent, proceeding from an unjust violation of his engagement, or a conscientious, although mistaken view of the obligation. While we then thought, and now think, that the jury might take such matters into their consideration in assessing the damages, we did not intend that they should go out of the limits of the market price, nor take as that price whatever the holders of coffee might choose to ask for it, substituting a fictitious, unreal value which nobody would give, for that at which the article might be bought and sold. It has grown into a proverb that a thing is worth what it will bring, not what the caprice or speculating anticipations of its owner may induce him to ask for it.”¹ It is the market price when there is one, at the date of the breach, which governs in the estimate of damages. Whether the contract fixes a day for the delivery, or allows a reasonable time, delay of the vendor, although by consent, but without any valid agreement for such delay which would preclude the purchaser from bringing an action at once, does not extend the time so that an advance in the market price meanwhile can be considered in computing damages on a failure to deliver after such delay.² And the

¹ *Blydenburgh v. Welsh*, supra.

² *Norton v. Wales*, 1 Robt. 561; *Sleuter v. Wallbaum*, 45 Ill. 43. Compare *Hickman v. Haynes*, L. R. 10 C. P. 598; 44 L. J. C. P. 358; *Williams v. Woods*, 16 Md. 220; *Hill v. Smith*, 34 Vt. 433; S. C. 34 id. 535; *Ogle v. Earl Vane*, L. R. 3 Q. B. 272; L. R. 2 id. 275. In *Hickman v. Haynes*, supra, it was held that when a vendor of

goods by a contract in writing, at the request of the purchaser, who is, at the time fixed for delivery, unable to take and pay for the goods, withholds delivery till a later date, on a parol promise to the purchaser to that effect, if at the expiration of the latter time so fixed, refuses to accept delivery, the vendor may sue for damages as for a breach at the time fixed for delivery by the orig-

market value at the place of delivery is that which must fix the measure of damages.¹

In the absence of a market at that place, the value there is to be ascertained; and this may be done by proving the market price at the nearest point where the goods of the quantity in question could be bought or sold, with such addition or deduction of the cost of transportation as will be necessary to determine the value at the place of delivery depending on the direction to the controlling market of sale.² For the purpose of showing the plaintiff's loss from non-fulfilment of the contract, he is not confined to any particular species of evidence to prove the value of the property at the place of delivery. He may show it by the market price there, if there have been sales enough to make a market price; or he may show its value at the market where such commodities are usually sent for sale, and the cost of transportation from the place of delivery.³

The inquiry is also to be confined to the ascertainment of the actual value at the place and time of delivery, and it is not admissible to inquire as to the probable effect of adding the goods in question to the quantity in market;⁴ nor of the plaintiff's

inal contract, and is entitled to damages according to the market price at the later date verbally fixed for the purchaser's convenience.

¹ *Phelps v. McGee*, 18 Ill. 155; *Deere v. Lewis*, 51 id. 254; *Barker v. Mann*, 5 Bush, 672; *McKenney v. Haides*, 63 Me. 74; *Young v. Lloyd*, 65 Pa. St. 199; *Hill v. Canfield*, 56 id. 454; *Gregory v. McDowell*, 8 Wend. 435; *Grand Tower Co. v. Phillips*, 23 Wall. 471.

² *Berry v. Dwinell*, 44 Me. 255; *Furlong v. Polleys*, 30 id. 491; *Washington Ice Co. v. Webster*, 68 id. 463; *Rice v. Manley*, 66 N. Y. 82; *Harris v. Panama R. R. Co.* 58 id. 660; *Gregory v. McDowell*, 8 Wend. 435; *McHose v. Fulmer*, 73 Pa. St. 365.

³ *Stevens v. Lyford*, 7 N. H. 360; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Hanson v. Lawson*, 19 Kan. 201; *Hazleton Coal Co. v.*

Buck Mt. Coal Co. 57 Pa. St. 301; *Sellar v. Clelland*, 2 Colo. 532; *Wemple v. Stewart*, 22 Barb. 154; *Muller v. Eno*, 14 N. Y. 597; *Durst v. Burton*, 37 N. Y. 167.

⁴ *Dana v. Fiedler*, 12 N. Y. 40. In this case questions to witnesses had been excluded. Referring to them, *Johnson, J.*, said: "The evident object of all these inquiries was to show that if the defendant had performed, and the plaintiff had desired to sell the whole quantity [one hundred and fifty tons of madder], the market price would have been lowered by throwing so large a quantity at once upon the market. A sufficient answer to all these exceptions is, that they are founded upon an attempt to substitute a hypothetical market value for the actual market value. They call upon the jury to speculate as to the consequences

going into the market to buy goods of the kind and in the quantity contracted for and not delivered.¹

If the market is fluctuating, and especially if raised or depressed by temporary and transient causes, or produced by interested and illegitimate combinations, for temporary special and selfish objects, independent of the influences of lawful commerce, the market price on the precise day of delivery will not necessarily govern. The law in regulating the measure of damages contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time.² Where there is a stimulated market price, created by artificial and fraudulent practices, it is not the true test and evidence of value. The market price being only evidence of value, the law adopts it as a natural inference of fact, and not as a conclusive legal presumption. The market price stands as a criterion of value, because it is a common test of the ability to purchase the thing.³ In such cases, what is called the market price, or the quotations of the articles for a given day, is not the only evidence of value; the true value may be drawn from other sources.⁴

The defaulting vendor cannot be charged with more than the market price, merely because the vendee had a contract for resale at a higher price;⁵ nor can he claim any mitigation where the vendee has contracted for a resale at less than the market price.⁶ But if the vendor sells the goods which he contracted, the party to whom they were contracted may recover on the basis of the amount the vendor has sold for.⁷

which would have resulted to the plaintiff if the defendant had performed his contract. The rule of damages was correctly laid down by the court (*Clark v. Pinney*, 7 Cow. 681; *Dey v. Dox*, 9 Wend. 129; *Davis v. Shields*, 24 Wend. 322); and the market value of the article on the day of delivery, which that rule fixes as the test, requires an investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist."

¹ *Jemmison v. Gray*, 29 Iowa, 537.

² *Smith v. Griffith*, 3 Hill, 333; *Durst v. Burton*, 47 N. Y. 167; *Cahen v. Platt*, 69 N. Y. 343.

³ *Kountz v. Kirkpatrick*, 72 Pa. St. 376; *Muller v. Eno*, 14 N. Y. 597. See *Trout v. Kennedy*, 47 Pa. St. 387.

⁴ *Id.*

⁵ *Williams v. Reynolds*, 6 B. & S. 495; 11 Jur. N. S. 973; *Cole v. Swanston*, 1 Cal. 51.

⁶ *Josling v. Irvine*, 6 H. & N. 512.

⁷ *Peterson v. Ayer*, 13 C. B. 353; *Gainsford v. Carroll*, 2 B. & C. 624.

Where the market price is less than the contract price at the date when the contract requires delivery, the vendee can suffer no actual injury; he is, however, entitled to nominal damages.¹ If the vendor sells a part of the goods to another purchaser, and thus puts it out of his power to perform his contract, the vendee, if he has received none of the property, is entitled to the difference between the contract and the market price of all the goods purchased, and not merely of that which the vendor had sold to another.²

Where, by the terms of a contract between the owner of property and another, it is agreed that the latter is not a purchaser of the property, but is to sell it, and to account to the owner for the avails of the sales at a certain rate, the rule of damages, as between vendor and vendee, does not apply.³

PROOF OF VALUE.—The proof of value is generally by the judgment or opinion of witnesses.⁴

If the article in question has a market value, that will usually control as the best evidence of its value.⁵ If this test has been applied to it by actual sale of it, the fact may be proved as evi-

¹Rose v. Bozeman, 41 Ala. 678; Bush v. Canfield, 2 Conn. 485; Valpy v. Oakeley, 16 Q. B. 941; Griffiths v. Perry, 1 E. & E. 680; Maher v. Riley, 17 Cal. 415.

²Crist v. Armour, 34 Barb. 378. In Somers v. Wright, 115 Mass. 292. A agreed to sell by warranty deed a lot of land to B, for a certain sum, payable in lumber "at current retail prices." A bound himself to discharge an existing mortgage on or before a certain day, and it was also agreed that B should not pay the lumber agreed upon as the price above the amount of the mortgage, computed at the current retail prices, until the discharge of such mortgage. A did not discharge the mortgage, and B paid it to prevent a foreclosure. It was held that B, in an action on A's contract to discharge the mortgage, was entitled to recover the loss of profits which

would have accrued by the delivery of the lumber, and that the measure of damages was the difference between the wholesale and the retail price of the lumber.

In Harrison v. Charlton, 37 Iowa, 134, C bought of H a lumber yard, the stock to be invoiced and delivered at a future day, and H in the meantime to make no additions thereto. H made additions, which were unknowingly included and paid for by C. *Held*, the measure of damages was the difference between the price paid by him for the additional lumber and the market price at which he could have purchased the same.

³Giles v. Morrison, 50 Barb. 50.

⁴Vol. I, p. 795.

⁵Cahen v. Platt, 69 N. Y. 348; Durst v. Burton, 47 id. 167. See Parks v. Morris Ax & T. Co. 54 N. Y. 586.

dence of its value.¹ It is not conclusive, but tends to show its value, and in the absence of other evidence would suffice.² Even the amount the goods cost is admissible for the same purpose.³ When the cost was the price at which a regular dealer in such articles had sold it when new, in the ordinary course of trade, it is evidence of the market value; and if afterwards deteriorated by use, like furniture, its present value can be ascertained by reference to the former price and the extent of depreciation.⁴ So the amount it sold for at auction has been admitted.⁵ Witnesses having the requisite knowledge may testify as to market prices. In doing so they testify to facts, rather than opinion. It is knowledge more or less special, though it is largely, and may be exclusively, hearsay.⁶

Market prices themselves are the estimate or opinion of those who influence the market; that opinion is expressed in actual transactions; and it is a knowledge of these, in such form as is usually relied on, which qualifies the witness to testify. Such a witness — that is, one who has thus informed himself in respect to market prices which are relevant, and not presumed to be within the actual knowledge of all jurors — may testify to them though he knows nothing of the property in question.⁷ He may be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates, and has not heard all the evidence given in the case.⁸

Merchandise brokers in Boston, and members of firms doing business and having houses established in Boston and New York,

¹ *Muller v. Eno*, 14 N. Y. 597.

² *Id.*

³ *Smith v. Griffith*, 3 Hill, 333.

⁴ *Luse v. Jones*, 39 N. J. L. 707.

⁵ *Cronnse v. Fitch*, 14 Abb. 346.
See *Bissell v. Starr*, 32 Mich. 297;
Willamet Falls C. & L. Co. v. Kelly,
3 Oregon, 99; *Wilson v. Holden*, 16
Abb. 133.

⁶ *Harrison v. Glover*, 72 N. Y. 451;
Washington Ice Co. v. Webster, 68
Me. 463; *Whitney v. Thatcher*, 117
Mass. 523; *Lush v. Druse*, 4 Wend.
313; *Savercool v. Farwell*, 17 Mich.
308; *Cliquot's Champagne*, 3 Wall.

114; 1 Whart. Ev. §§ 446, 449; *Stone
v. Covell*, 29 Mich. 359.

⁷ *Miller v. Smith*, 112 Mass. 475;
Beecher v. Denniston, 13 Gray, 354;
Fitchburg R. R. Co. v. Freeman,
12 id. 401; *Brady v. Brady*, 8 Allen,
101; *Lawton v. Chase*, 108 Mass.
238; *McCullum v. Seward*, 62 N. Y.
316; *Reynolds v. Robinson*, 64 id.
589.

⁸ *Woodbury v. Obear*, 7 Gray, 467;
Hunt v. Lowell Gas Light Co. 8
Allen, 169, 172; *Cornell v. Dean*, 105
Mass. 435; *Browne v. Moore*, 32
Mich. 254.

who are familiar with the market of a particular line of goods in New York, and whose information is derived from the daily price current lists, and returns of sales daily furnished them in Boston from their New York houses, may testify to such value in the New York market at a given time.¹ The market price of a marketable commodity may be determined as well by offers to sell, made by dealers in the ordinary course of business, as by actual sales; and statements of dealers, in answer to inquiries as to price, are competent evidence.² A price current published in a newspaper is not competent evidence of market value, without proof as to the sources from which the information which formed their basis was obtained; or whether the quotations of prices were from actual sales or otherwise. The credit to be given to the paper must depend upon such extrinsic proof; it cannot be determined by the publication itself.³ An unaccepted offer, as an isolated transaction, is not competent evidence upon the question of value. But in a market regularly attended by buyers and sellers, an offer as well as a sale of an article of recognized uniform character, constantly bought and sold in that market, so as to have a place on the daily price current list, may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity, and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value. That dealers are themselves guided in their transactions by such indications of the state of the market, makes the fact one that may properly be considered in evidence.⁴

Whether the very property to be valued corresponds with property to which the market prices apply, is a matter of judgment. A witness who has knowledge of market values, and

¹ *Whitney v. Thacher*, 117 Mass. 523.

² *Harrison v. Glover*, 72 N. Y. 451.

³ *Whelau v. Lynch*, 60 N. Y. 469. In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market price had inquired of merchants dealing in the article, and examined their books, thus giving

the sources of his knowledge. In *Cliquot's Champagne*, 3 Wall. 114, it appeared that the price current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy.

⁴ *Whitney v. Thacher*, 117 Mass. 523.

who knows the property in question, may give his opinion of its value.¹ Every one is supposed to have some idea of the value of such property as is in general use; and it is not necessary to have a drover or a butcher to prove the value of a cow;² and an expert is not an indispensable witness.³ If the article in question has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, and its utility and use. And opinions of witnesses properly informed on the subject may also be given in respect to its value.⁴ In an action for the conversion of the bonds of a California corporation, which had never been put in market, and therefore had no market value, it was held that, though being payable in dollars, so that legally paper dollars would discharge them, yet it might be shown that in California they were treated as payable in coin, and were practically payable in gold, with a view to their valuation by that standard.⁵ In New Hampshire the rule appears to be to exclude opinions upon the subject of value.⁶

¹ *Id.*; *Brill v. Flagler*, 23 Wend. 354; *Parks v. Morris Ax & T. Co.* 54 N. Y. 593; *Kellogg v. Krauser*, 14 S. & R. 137; *Haskell v. Mitchell*, 53 Me. 468; *Whiteley v. China*, 61 Me. 199; *Snow v. Barton & Me. R. R.* 65 Me. 230; *Shattuck v. Stoneham, etc. R. R.* 6 Allen, 115; *Swan v. County of Middlesex*, 101 Mass. 173; *Kronschnable v. Knoblauch*, 21 Minn. 56; *Thatcher v. Kanher*, 2 Colo. 698; *Clarion Bank v. Jones*, 21 Wall. 325; *Whelan v. Lynch*, 60 N. Y. 469; *Covey v. Campbell*, 52 Ind. 157; *Chamness v. Chamness*, 53 id. 301; *Williams v. Brown*, 28 Ohio St. 547; *Lush v. Druse*, 4 Wend. 313; *Cliquot's Champagne*, 3 Wall. 114; *Lafayette, etc. R. R. Co. v. Winslow*, 66 Ill. 219; *Toledo, etc. R. R. Co. v. Kickler*, 51 Ill. 157; *White v. Herman*, 51 id. 243; *Eagle, etc. Co. v. Bronne*, 58 Ga. 240; *Hanover Water Co. v. Ashland Iron Co.* 84 Pa. St. 279; *Holton v. Board, etc.* 55 Ind. 194; *Carpenter v. Robinson*, 1

Holmes, 67; *Barger v. N. P. R. R. Co.* 22 Minn. 343.

² *Ohio & Miss. R. R. Co. v. Irvin*, 27 Ill. 178.

³ *Ohio & Miss. R. R. Co. v. Taylor*, 27 Ill. 207.

⁴ *Masterton v. Mayor of Brooklyn*, 7 Hill, 61; *Murray v. Stanton*, 99 Mass. 345; *Lafayette, etc. R. R. Co. v. Winslow*, 66 Ill. 219; *White v. Hermann*, 51 Ill. 243; *Kellogg v. Krauser*, 14 S. & R. 137; *Eaton v. Mellus*, 7 Gray, 566; *Berry v. Dwinnel*, 44 Me. 255; *Wemple v. Stewart*, 22 Barb. 154; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Trout v. Kennedy*, 47 Pa. St. 387; *Saunders v. Clark*, 106 Mass. 331; *Jemison v. Gray*, 29 Iowa, 537; *Graham v. Maitland*, 1 Sweeny, 149. See *Kerschman v. Lediard*, 61 Barb. 573.

⁵ *Simpkins v. Low*, 54 N. Y. 183.

⁶ *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jaffrey*, 6 id. 462; *Whipple v. Walpole*, 10 id. 130; *Hoitt v. Moulton*, 21 id. 586.

RULE IN FAVOR OF VENDOR WHEN DELIVERY BECOMES IMPOSSIBLE. The vendor may be relieved from the payment of damages by delivery being rendered impossible by the act of God. Thus, where a contract is made for the sale and delivery of specific articles of personal property, under such circumstances that the title does not pass, if the property is destroyed by accident, without the fault of the vendor, he is not liable to the vendee in damages for non-delivery.¹ And it has been said in a recent case in England,² that "where a contract of sale has been made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible."³ In the case from which this quotation is made, Blackburn, J., delivering the unanimous decision of the court, said: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility arising from the perishing of the person or thing shall excuse the performance."⁴

The vendor may likewise be excused, as may all contracting parties, when the act stipulated to be done has become unlawful,—as would be the case, if, after making the agreement, a statute is passed rendering the performance illegal.⁵

RULE WHERE THE PURCHASE PRICE HAS BEEN PAID.—If at the time of making an executory agreement for the sale of goods, payment for the goods is made to the vendor, and he afterwards neglects or refuses to complete the sale by delivery, the

¹ *Dexter v. Norton*, 47 N. Y. 62.

² *Taylor v. Caldwell*, 3 B. & S. 826.

³ *Rugg v. Minett*, 11 East, 210.

⁴ *Appleby v. Meyers*, L. R. 1 C. P. 165; *S. C. L. R.* 2 C. P. 651; *Robinson v. Davidson*, L. R. 6 Ex. 269; *Knight v. Bean*, 22 Me. 531; *Dickey v. Linscott*, 20 id. 453.

⁵ *Benj. on Sales*, § 571 and note; *Bailey v. DeCrispigney*, L. R. 4 Q. B.

180; *Bayliss v. Fettyplace*, 7 Mas. 325; *Chancy v. Overman*, 1 Dev. & Bat. 402; *Jones v. Judd*, 4 Comst. 412; *Davis v. Cary*, 15 Q. B. 418. The learned author just cited says generally of defense of impossibility: "If the thing promised be possible in itself, it is no excuse that the promisor became unable to perform it by causes beyond his own control,

amount paid with interest should be added to the amount of damages which the vendee is otherwise entitled to recover. In other words, the vendee is entitled to recover the market value of the goods at the time and place when and where they should have been delivered.¹ In some of the states, the highest market price between the date of the breach, and the commencement of the action or the trial, is the measure of damages where the price has been paid; if there has been no unreasonable delay in commencing or prosecuting the suit.² This doctrine has been

for it was his own fault to run the risk of undertaking, unconditionally, to fulfil a promise, when he might have guarded himself by the terms of his contract." *Benj. on Sales*, § 571 and note (g). See also § 572.

¹ *Bozeman v. Rose*, 40 Ala. 212; *Rose v. Bozeman*, 41 id. 678; *McGehee v. Posey*, 42 id. 330; *Moore v. Fleming*, 34 Ala. 49; *Neil v. Clay*, 48 id. 252; *Ratan v. Hinchman*, 29 N. J. L. 112; *Fenton v. Perkins*, 3 Mo. 23; *Farwell v. Kennett*, 7 Mo. 595; *Alexander v. Macauley*, 6 Md. 359; *Dyer v. Rich*, 1 Met. 180; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Leach v. Smith*, 25 Ark. 246; *Kerschman v. Lediard*, 61 Barb. 573; *Cleveland & P. R. R. Co. v. Kelley*, 5 Ohio St. 180; *Underhill v. Goff*, 48 Ill. 198; *Butler v. Baker*, 5 Ohio St. 484; *Bicknell v. Waterman*, 5 R. I. 43; *Marshall v. Ferguson*, 23 Cal. 65; *Enders v. Board of Public Works*, 1 Gratt. 372; *Baltimore City, etc. R. R. Co. v. Sewell*, 35 Md. 238; *McDonald v. Hodge*, 5 Hayw. 86; *Doak v. Snapp*, 1 Cold. 180; *Hamilton v. Gangard*, 34 Barb. 204; *Haywood v. Haywood*, 42 Me. 229; *West v. Pritchard*, 19 Conn. 212; *Whitsett v. Forehand*, 79 N. C. 230; *Kitzenger v. Sanborn*, 70 Ill. 146; *Kribbs v. Jones*, 41 Md. 396; *Parsons v. Sutton*, 66 N. Y. 92; *Sadler v. Bean*, 37 Iowa, 439; *Moorehead v. Hyde*, 38 id. 382;

Smith v. Berry, 18 Me. 122; *Warren v. Wheeler*, 21 id. 484; *Furlong v. Polleys*, 30 id. 491; *Berry v. Dwinel*, 44 id. 255; *Bush v. Holmes*, 53 id. 417; *Rider v. Kelley*, 32 Vt. 268; *Hill v. Smith*, id. 433; *Copper Co. v. Copper Min. Co.* 33 id. 92; *Wyman v. Am. Powder Co.* 8 Cush. 168; *Pinkerton v. Manchester, etc. R. R.* 42 N. H. 424. In *Dey v. Dox*, 9 Wend. 129, a vendor when sued on a contract of sale by which he agreed to deliver property, and for which only a nominal sum is paid down, permitted the vendee to recover the value of the property because he did not set up the fact of non-payment; held, he was thereby precluded from bringing a subsequent action for the value of the goods. The legal measure of damages for non-delivery of goods sold, but not paid for, is the difference between the contract price and the market value at the time when it should have been delivered.

² *Randon v. Barton*, 4 Tex. 489; *Calvit v. McFadden*, 13 id. 324; *Brasher v. Davidson*, 31 id. 190; *Gregg v. Fitzlugh*, 36 id. 127; *Cartwright v. McCook*, 33 id. 612; *West v. Pritchard*, 19 Conn. 212; *Davenport v. Wells*, 3 Iowa, 242; *Cannon v. Folsom*, 2 id. 101; *Stapleton v. King*, 40 id. 278; *Kent v. Ginter*, 23 Ind. 1; *Maher v. Riley*, 17 Cal. 445.

held in New York,¹ but the tendency of the later decisions is towards the standard of the value at the time and place of the breach.²

¹ *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 id. 681; *Commercial Bank v. Kortright*, 22 Wend. 348; *Wilson v. Little*, 2 Comst. 443; *Lobdell v. Stowell*, 51 N. Y. 70.

² *Ormsby v. Vermont Copper M. Co.* 56 N. Y. 623; *Tyng v. Commercial Warehouse Co.* 58 id. 308; *M. & T. Bank v. F. & M. Nat. Bank*, 60 id. 40; *Whelan v. Lynch*, id. 469; *Wintermute v. Cooke*, 73 id. 107. In *Baker v. Drake*, 53 N. Y. 211, the previous decisions in cases of conversion were reviewed, and the law held to be that there is not a fixed and unqualified rule giving the plaintiff, in all cases of conversion, the highest market price from the time of conversion to the time of trial; and that such a rule cannot be upheld on any sound principle of reason or justice.

Referring to *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91, affirmed, 22 id. 248; *West v. Wentworth*, 3 Cow. 82; and *Clark v. Pinney*, 7 id. 596, *Rapello, J.*, said: "These were actions for the non-delivery of merchandise in pursuance of a contract of sale, and the extreme rule was applied, of allowing to the vendor, as damages, the highest value up to the time of trial. This rule was, however, strictly confined to cases where the purchase price had been paid in advance, it being conceded that in the ordinary case, where the price was to be paid on delivery, the only rule is the market value on the day appointed by the contract for their delivery. It cannot be disputed that this distinction, though questioned by high authority, has long been acted upon in this state in respect to contracts

for the sale and delivery of goods. The reason upon which it is founded is that, where the purchaser has not paid for the goods, he may, on the refusal of his vendor to deliver, go into the market and buy goods of a similar quality, and that what it would cost him to do this is the just measure of his damages; but where he has paid the purchase money, it is unreasonable to require him to pay it a second time; and therefore all fluctuations in price should be at the risk of the vendor who refuses to deliver, while retaining the purchase money. The very reasoning upon which these decisions are founded demonstrates their inapplicability to a case like the present, where the purchase money of the stocks [bought on a margin] has not been paid by the complaining party, and the only additional payment which he would be required to make for the purpose of replacing the stocks would be such as was occasioned by the rise in the market price."

The general reasoning in this opinion is against the rule of the highest price after conversion or delivery due on contract, though the facts of the case were considered as not requiring the court to go the length of an unqualified reversal of the rule which had been so generally followed in that state. But subsequent cases, which have just been cited, show that *Baker v. Drake* has been accepted and followed as a case which has accomplished that departure.

The facts of the case, and the law involved, are thus stated and commented on in the opinion: "All that

CONTRACTS FOR THE DELIVERY OF STOCKS.—Bellows, J., in a late New Hampshire case, thus sums up the reasons for the general rule: “The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule, and easy of application, and we are unable to yield to the reasons assigned for the exception which has

appears upon the subject (of the terms of the contract) in the evidence is that the plaintiff, through his friend Rogers, deposited various sums of money with the defendants, and, from time to time, directed them to purchase, for his account, shares of stock to an amount of cost from ten to twenty times greater than the sums deposited; which they did. No agreement as to margin, or as to carrying of the stock by the defendants, is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should, from time to time, require; and that they would purchase the stock and hold and carry the same, subject to the plaintiff's direction as to the sale and disposition thereof, as long as the plaintiff should desire, and would not sell or dispose of the same, unless the plaintiff's margin should be exhausted or insufficient, and not then, unless they should demand of the plaintiff increased security, or require him to take and pay for the stocks, and give him due notice of the time and place of sale and due opportunity to make good his margin. The answer denies only the agreement to give notice of the time and place of sale, admitting, by implication, that, in other respects, the agreement is correctly set forth.

. . . It appears that the plaintiff had, during the whole course of his

transactions with the defendants, advanced, in the aggregate, but \$4,240 towards the purchase of shares which, at the time of the alleged wrongful sale, November 18, 1868, had cost the defendants upwards of \$66,300 over and above all the sums so advanced by the plaintiff. By the stock lists in evidence, it appears that these shares were then of the market value of less than \$67,000, and the surplus arising from the sale, after paying the amount due the defendants, amounted to only \$558, which sum represents the value at that time of the plaintiff's interest in the property sold.

“It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of the action, November 24, 1868, the shares would have brought some \$5,500 more than the sum for which they had been sold. But after the commencement of the action, and before the trial, the stock underwent an alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale of thirty shares at one hundred and seventy per cent. was proved. It afterwards declined, and on the day preceding the trial, October 20, 1879, the price was one hundred and forty-three, having, for a month previous to the trial, ranged between one hundred and thirty-seven and one hundred and forty-five.

been sanctioned in New York and elsewhere. It is true that in some cases the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be deliv-

"The jury, in obedience to the rule laid down by the trial court, found a verdict for the plaintiff for \$18,000, being just the difference between one hundred and thirty-four, which was the average price at which the defendant sold, and one hundred and seventy, the highest price touched before the trial,—thirty-six per cent. on five hundred shares. More than two-thirds of this supposed damage arose after the bringing of the suit.

"This enormous amount of profit, given under the name of damages, could not have been arrived at, except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

"In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct the defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in

a further loss as in profit, to lay down as an inflexible rule of law as damages for its wrongful interruption the largest amount of profit which subsequent development disclosed might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded. . . . But the rule adopted in *Markham v. Jaudon* (41 N. Y. 235), passing far beyond the scope of reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar, and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good, and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless, he can incur no loss; but if, at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a

ered entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, to hold that the plaintiff might elect as the rule in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would in many cases be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial or otherwise. Shall there be different measures of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are doubtless cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of failure to deliver such stock, the right to elect their value at any time before trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain.”¹

retrospect and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss.” The court reaches the conclusion that the dissenting opinions of Grover and Woodruff, JJ., in the case referred to, embody the sounder law.

¹ *Pinkerton v. Manchester, etc. R.* 42 N. H. 424. In *Mayne on Damages* (2d ed.), p. 123, this subject is thus treated: “In the cases above discussed, no payment has been

made for the goods, and on this ground they were distinguished from actions for not replacing stock, because in that case the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. *Gainsford v. Carroll*, 2 B. & C. at p. 625. Accordingly, where there has been a loan of stock, and a breach of the agreement to replace it, the measure of damages is held to be the whole value of the stock lent, taken at such a rate as will indemnify the plaintiff. Therefore, where the

There are cases in this country which distinguish contracts for the delivery or replacing of stock from other contracts of sale, by allowing for breach of the former the highest value up

stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial. *Downes v. Back*, 1 Stark. 318; *Harrison v. Harrison*, 1 C. & P. 412; *Shepherd v. Johnson*, 2 East, 211; *Owen v. Routh*, 14 C. B. 327. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring the action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market. *Per Grose*, 2 East, 212. In one case where it had fallen, it was estimated at its price on the day it ought to have been replaced (*Sanders v. Kentish*, 8 T. R. 162); and in another case, where no day was named for its replacement, and it had fallen in value, at its price on the day when it was transferred to the borrower. *Forrest v. Elwes*, 4 Ves. 492. But the plaintiff cannot recover the highest price which the stock had reached at any intermediate day (*McArthur v. Seaforth*, 2 Taunt. 257); because such a measure involves the assumption that he would have sold out upon that day, which is purely speculative profit. Nor can he claim damages for any profit which he might have made, had he possessed the stock, at all events, unless his wish to have it back for that express purpose was distinctly communicated to the defendant. Therefore, when the defendant lent five per cent. stock which was to be replaced on a fixed day, and after that day the government gave the holders an option to be paid off at par, or to commute

their stock for three per cents; the plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take the new stock; held, that he was not entitled to recover the price of so much of three per cent. stock as he might have obtained in exchange for his five per cents. *McArthur v. Seaforth*, *supra*.

"In the case cited, the profits claimed were both contingent in their nature, and collateral to the breach of contract. But where a bond was given to secure the replacement of stock, and payment in the meantime of sums equal to the interest and dividends, and a bonus was afterwards declared upon the stock, it was held by Sir John Leach, M. R., that in equity, and perhaps even at law, the lender was entitled to be placed in the same situation as if the stock had remained in his name, and was therefore entitled to the replacement of the original stock, increased by the amount of the bonus, and to dividends in the meantime, as well upon the bonus as upon the original stock. *Vaughan v. Wood*, 1 Myl. & K. 403.

"The rules established in the case of a loan of stock were held to be equally applicable where the loan was of mining shares. *Owen v. Routh*, 14 C. B. 327. There appears to be great similarity between these cases and that of a contract for the purchase of goods, in which payment is made beforehand. The plaintiff is equally kept out of his money, and, therefore, equally unable to protect himself by going into the market to buy that which the defendant has agreed to sell him.

to the time of trial, while the damages for the breach of the other have been measured by the value at the time when the goods should have been delivered.¹ But there appears to be no sound reason for this distinction. The market price of stocks fluctuates; so does the market price of other kinds of personal property; both are liable to factitious changes; but all stocks do not, nor do all other kinds of property, in fact, fluctuate to the same extent, or from the same immediate causes. The same considerations which commend the rule of the value at

The defendant has equally the use of the plaintiff's property, and is therefore able to make all the profits by means of it which the plaintiff could have made. If the case is to be governed by exactly the same rules as that of stock, it will require no farther discussion. But upon this point there seems to be very little agreement. . . . The only two cases in England which touch upon the subject, specifically, do not tend to clear it up very much. . . . (*Dutch v. Warren*, 2 Burr. 1010; *Startop v. Cortazzi*, 2 Cr. M. & R. 165.) . . .

"Such is the unsettled state of the law upon the subject. Mr. Sedgwick is of opinion that the period of breach is the true time, in all cases, for estimating the damages, unless it can be shown that the article was to be delivered for some specific object known to both parties at the time, and thus a loss within the contemplation of both parties has been sustained. Sedgw. on Dam. 310 (4th ed.). This doctrine cannot be maintained in England, if, as he also thinks, there is no valid reason for making any difference between stock and any other vendible commodity. It is quite settled that the price of stock may be taken at the time of trial. The cases may, however, be distinguished, on the ground that stock may be supposed to be

purchased rather as an investment than for resale, while goods are bought expressly to sell again. Consequently it may be assumed that the former would have remained in the possession of the buyer till the time of trial, while no such presumption can be raised in the latter case. If this be so, damages might fairly be calculated in regard to stock, at the price it bore at the time of trial; in regard to goods, according to their price at the latest period when we could be sure they would have remained in the plaintiff's hands, viz.: the time they ought to have been delivered." The courts of England, in actions for non-delivery of railway shares, have given the value at the date of the breach, and not of the trial, and such cases are distinguished from those for failing to replace borrowed stock. *Shaw v. Holland*, 15 M. & W. 116; *Tempest v. Kilner*, 2 C. B. 300; *Barnell v. Hamilton*, 2 Eng. Railw. Cas. 624. And in *Elliott v. Hughes*, 3 F. & F. 387, the measure of damages for non-delivery of goods by the highest price up to the trial was approved.

¹ *Wells v. Abernathy*, 5 Conn. 222; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Kent v. Ginter*, 23 Ind. 1; *McKenney v. Haines*, 63 Me. 74; *Musgrave v. Beckendorff*, 53 Pa. St. 310.

the time of the breach in the case of a contract for sale and delivery of merchandise, apply with equal force to contracts for the sale and delivery of stocks. And it is believed the weight of American authority is in favor of assessing the damages for breach of contracts of sale by the same rule, whether they relate to stocks or merchandise, and whether the price has been paid or not.¹

In a Virginia case, stock was borrowed to be returned at specified times, and dividends to be paid in lieu of interest. The stock was not returned, but the borrower continued to pay the dividends for some time after the date for returning the stock; it was held the general rule of damages against a vendor was the value of the property at the time it should have been delivered, and interest from that date until paid; that there is no distinction, in this respect, between contracts for the sale and delivery of stocks and other executory contracts of sale; that under the circumstances of this case, the lender might recover the value of the stocks at the time he ceased to pay dividends, with interest from that date.²

In an action at law against a corporation for refusing to issue or transfer stock, the rule of damages is the same as upon a sale; the plaintiff may claim in the same suit the value of the stock and the dividends thereon, and the measure of damages is the value of the stock at the time of the demand, together with the dividends accrued thereon at that time, with interest.³

CONTRACTS TO PAY IN, OR DELIVER SPECIFIC ARTICLES.—Where the vendee has paid or furnished the consideration, whether paid directly as purchase money, or is an antecedent debt, and the vendor, for that consideration, undertakes to deliver a specific quantity of goods of a given description, at a future day,

¹ *Enders v. Board of Public Works*, etc. 1 Gratt. 372; *Baltimore, etc. Co. v. Sewell*, 35 Md. 238; *White v. Salisbury*, 33 Mo. 150; *Alexander v. Macauley*, 6 Md. 359; *Eastern R. R. Co. v. Benedict*, 10 Gray, 212; *Noonan v. Ilsley*, 17 Wis. 314; *Doak v. Snapp*, 1 Cold. 180; *Smith v. Dunlap*, 12 Ill. 184, 193; *Sargent v.*

Franklin Ins. Co. 8 Pick. 90; *Smithurst v. Woolston*, 5 W. & S. 106; *Coldren v. Miller*, 1 Blackf. 296; *Van Vleit v. Adair*, id. 346; *Columbia v. Amos*, 5 Ind. 184.

² *Enders v. Board of Public Works*, etc. 1 Gratt. 372.

³ *Baltimore, etc. Co. v. Sewell*, 35 Md. 238.

the contract is of the very nature we have just considered, and the damages are calculated upon the value of the property in case of failure to deliver it.¹

The word "dollars" is sometimes used in such contracts, not to express the value in legal currency to be paid, but the quantity of the specific thing to be delivered. It is then a measure of quantity. Thus, on an agreement to pay a given sum in a particular species of paper, as bank or other notes, or stock, if not specifically performed, recovery can be had only of the value of such paper.²

Where one party gave another an acknowledgment of indebtedness, thus: "Due N \$300 in W. R. R. stock," it was held to bind the party giving it to pay so many dollars in the stock of the company as, when counted at par, would amount to \$300. And the court say: "If the stock is appreciated above par, the payee is to be benefited by the increased value; and, if depreciated, he is then to be restricted to \$300, although

¹Butler v. Baker, 5 Ohio St. 484; Dyer v. Rich, 1 Met. 180; Neel v. Clay, 48 Ala. 252; Leach v. Smith, 25 Ark. 246; Doak v. Snapp, 1 Cold. 180; McGehee v. Posey, 42 Ala. 330; Brasher v. Davidson, 31 Tex. 190; Cartwright v. McCook, 33 id. 612; Edgar v. Boise, 11 S. & R. 445; Safely v. Gilmore, 21 Iowa, 588; Hixon v. Hixon, 7 Humph. 33; Williams v. Jones, 12 Ind. 561; Pierce v. Spader, 13 id. 458; Williams v. Sims, 22 Ala. 512; Moore v. Fleming, 34 id. 491; Marr v. Prather, 3 Met. (Ky.) 196; Herbert v. Easton, 43 Ala. 547; Powe v. Powe, 42 Ala. 113; Mettles v. Moore, 1 Blackf. 342; Hedges v. Gray, id. 216; Clay v. Huston, 1 Bibb, 461; West v. Wentworth, 3 Cow. 82; Barrett v. Allen, 10 Ohio, 426; Smith v. Berry, 18 Me. 122; Vance v. Bloomer, 20 Wend. 196; Rockwell v. Rockwell, 4 Hill, 164; Baker v. Mair, 12 Mass. 121; Brooks v. Hubbard, 3 Conn. 58; Gilbert v. Danforth, 6 N. Y. 585; Newman v. McGregor, 5 Ohio, 349; Starr

v. Light, 22 Wis. 414; Jennison v. Gray, 29 Iowa, 537.

²Hixon v. Hixon, 7 Humph. 33; Robinson v. Noble, 8 Pet. 181; Hopson v. Fountain, 5 Humph. 140; Bush v. Hibbard, 24 Barb. 292; Gordon v. Parker, 2 Sm. & M. 485; Walker v. Meek, 12 id. 495; Arnold v. Suffolk Bank, 27 Barb. 424; Bank of Montgomery v. Reese, 26 Pa. St. 143; Eastern R. R. Co. v. Benedict, 10 Gray, 212; Child v. Pierce, 37 Mich. 155; Coldren v. Miller, 1 Blackf. 296; Van Vleet v. Adair, id. 346; Cotton v. Reed, Sneed (Ky.), 24; Fosdick v. Greene, 27 Ohio St. 484; Green v. Sizer, 40 Miss. 530; Kirtland v. Molton, 41 Ala. 548; Williams v. Jones, 12 Ind. 561; Anderson v. Ewing, 3 Litt. 245; Pierce v. Spader, 13 Ind. 458; Memphis, etc. R. R. Co. v. Walker, 2 Head, 467; Williams v. Sims, 22 Ala. 512; Hart v. Lanman, 29 Barb. 410; Marr v. Prother, 3 Met. (Ky.) 196; Clay v. Huston, 1 Bibb, 461; Doak v. Snapp, 1 Cold. 467.

worth less than that sum in money. The authorities abundantly show that where the instrument, like the one at bar, is to be paid in bank notes, or in stock or scrip, in the similitude of bank notes, then the market value of the notes, stock or scrip is the measure of damages. And the reason given for the rule is, that where a party engages to pay so many dollars in bank notes, stock or scrip, the articles are described and numerically calculated by the number they express; so that \$300 in railroad stock or bank notes is understood to mean that amount as expressed upon the face of the stock or note, and not the amount which will be equivalent in value to \$300 in money; while an instrument drawn for the payment of so many dollars in chattels — wheat, salt, cloth, wool, or other like articles — is construed to mean so much of those things as will amount to the sum in money, because the things themselves cannot be counted by dollars, as the name is never applied to them.”¹

It has been already stated that if the property to be delivered have no market value its real value is to be ascertained by such elements of value as are attainable.² Of this character are promissory notes; stock of projected corporations which fail to organize, or any stocks in which there has been no traffic. Where such subjects are contracted to be sold, and there is no market value, how may value be established? Where, for instance, a contract is made for the transfer of a third person's note of a certain amount in exchange for property, upon breach, it has been held that the measure of damages is what

¹ Noonan v. Ilsley, 17 Wis. 314; Anderson v. Ewing, 3 Litt. 245; German Union, etc. Asso. v. Sendmeyer, 50 Pa. St. 67; Dillard v. Evans, 4 Ark. 175; Phelps v. Riley, 3 Conn. 266; Robinson v. Noble, 8 Pet. 181; Parks v. Marshall, 10 Ind. 20; Orange & A. R. R. Co. v. Fulvey, 17 Gratt. 266; Mettlea v. Moore, 1 Blackf. 342; Wyman v. American Powder Co. 8 Cush. 168; Hedges v. Gray, 1 Blackf. 216; Haumston v. Telegraph Co. 20 Wall. 20; Hussey v. Manuf. & Mar. Bank, 10 Pick. 415; Thrasher v. Pike Co. R. R. Co. 25 Ill. 393; Ratan v. Hopper. 29 N. J. L. 112; Sargent v. Franklin Ins. Co. 8 Pick. 90; Eastern R. R. Co. v. Benedict, 10 Gray, 212; Smith v. Dunlap, 12 Ill. 184; Sirlott v. Tandy, 3 Dana, 142; Breckenridge v. Rolls, 2 T. B. Mon. 150; January v. Henry, 3 id. 8; White v. Green, id. 155; Alexander v. Macauley, 6 Md. 359. See Thornton v. Smith, 8 Wall. 1, and Shelton v. French, 33 Conn. 489.

² Ante, pp. 375-378.

the note purports to be worth.¹ But in Alabama it is held that such an undertaking is not one to pay the face of the notes;² that the onus of proving the value is on the plaintiff; and that, in the absence of affirmative proof of value, only nominal damages can be given.³ It is believed that the weight of authority is in favor of the rule that notes are *prima facie* worth their face; and that, in the absence of disparaging evidence, damages may be assessed on that basis, both in actions for failure to transfer and for conversion.⁴

Stocks, like promissory notes, have a nominal value expressed in dollars or pounds sterling; and, as we have seen, on a breach of a contract for the delivery or transfer of stock, recovery is based on its market value, if it has such. In the absence of that

¹ Fenton v. Perkins, 3 Mo. 23; Shelton v. French, 33 Conn. 489; Farwell v. Kennett, 7 Mo. 595; Child v. Pierce, 37 Mich. 155; Bates v. Cherry Valley R. R. Co. 3 Thomp. & C. 16; Thomas v. Dickinson, 12 N. Y. 364; S. C. 23 Barb. 431; Kerschman v. Lediard, 61 Barb. 573.

² Williams v. Sims, 22 Ala. 512; Jolly v. Walker, 26 id. 690; Wilson v. Jones, 8 id. 536; Carter v. Penn. 4 id. 140; Moore v. Fleming, 34 id. 491.

³ Id. See also McKiel v. Porter, 4 Ark. 534; Elliott v. Chilton, 5 id. 181.

⁴ Neff v. Clute, 12 Barb. 466; Baker v. Jordan, 5 Humph. 485; Pledger v. Wade, 1 Bay, 35; Sturges v. Keith, 57 Ill. 451; Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 id. 484; Eastern R. R. Co. v. Benedict, 10 Gray, 212; Arnold v. Suffolk Bank, 26 Barb. 424; Thomas v. Dickinson, 23 Barb. 431; 12 N. Y. 364; Child v. Pierce, 37 Mich. 155; Clay v. Huston, 1 Bibb, 461; Parks v. Marshall, 10 Ind. 20; Smith v. Dunlop, 12 Ill. 184; Ratan v. Hoppper, 12 N. J. L. 112. In Bicknall v. Waterman, 5 R. I. 43, there was an agreement for the exchange of a

specified lot of cotton for a specified note of a third person, at an agreed price for the cotton. The agreement was made through a broker acting for the parties, and, it being agreed that the purchaser's note should be given for the difference, nothing remained to be done but to deliver the cotton and receive the notes. It was held to be no defense to an action upon the contract for not delivering the cotton upon tender of the notes, that, before the contract was entered into, the maker of the first named note had failed, both parties and the broker being, at the time of the contract, ignorant of the failure; the law implying, in such a contract of exchange, no warranty of the solvency of the maker. The rule of damages in such a case was held to be the value of the note in money at the time of the contract, at the stipulated price of the cotton to be received in exchange, with interest upon the value from the day the cotton was demanded; the note which had been deposited in the registry of the court to be at the disposal of the defendant.

evidence of its value, other circumstances must be resorted to; and its nominal value will perhaps be accepted where there is no other proof. In one case, the plaintiff agreed to sell a certain patent to the defendants, who, it was recited in this agreement, were about to organize a company for the manufacture of the articles under the patent; the plaintiff agreed to make such conveyance as should be necessary to carry the agreement into effect immediately upon the organization of the company; and in consideration thereof the defendants agreed to transfer to the plaintiff, among other things, an amount equal to \$50,000 of the capital stock of the corporation. The court held that the plaintiff was entitled to damages for the breach of this contract; that the amount depended on the value of the stock after the corporation was formed, to be proven by showing what such value would have been if the company had been formed, taking into consideration the property that was to be transferred, and also that by the breach the plaintiff was released from the obligation to transfer the property. In such a case, it was held to be erroneous to give the plaintiff damages to the nominal amount of the stock. Referring to a previous case,¹ Ingraham, J., said: "In that case, the rule of damages was said to be the amount of the obligation to be delivered in payment. But there the plaintiff had transferred to the defendant the property he had agreed to sell, and the court held that the plaintiff could recover the price at which the same was agreed to be sold. Here there has been no conveyance of the property, but the same is retained by the plaintiff, and he is only entitled to damages, and not to the nominal value agreed to be paid. The rule of damages is to be fixed by proof of what the value of the stock would have been if the contract had been performed, over and above the property retained by the plaintiff. Had the property been transferred by the plaintiff, then, in the absence of any proof of value, the rule adopted on the trial would have been the correct one." The trial court had directed a verdict for the nominal amount of the stock.²

¹ Thomas v. Dickinson, 23 Barb. 431; reversed, 12 N. Y. 364.

² Kerschman v. Lediard, 61 Barb. 573; Bates v. Cherry Valley, etc. Co.

3 Thompson & C. 16; affirmed, 59 N. Y. 641. In Dyer v. Rich, 1 Met. 180, it was held that a promise that one shall receive a certificate of ten

Contracts are not unfrequently made upon executed considerations to pay a stated sum in specific articles. Upon failure to deliver the articles at the time they are due, the contract furnishes, in the stated sum, the measure of damages. It is the sum stated in the contract and agreed to be paid, with interest.¹

Where the agreement is to pay a certain specified sum, in specific articles at a stated price, there is much conflict as to the criterion of damages. Thus, a contract to pay two hundred and fifty dollars at a future day, in brown cotton shirting, at thirty cents per yard, was held to be an agreement to pay \$250, with an option to the maker to pay at maturity in brown shirting, at the stipulated price per yard. The court say that the promise to pay \$250 necessarily implies a recognition of indebtedness to that amount; that the residue of the note has no bearing on this point, and relates exclusively to the mode of payment; that the manner in which the debt is to be paid, whether in cash or in collateral articles, has no relevancy in ascertaining the sum due; it points to an object wholly separate and distinct. This is an early and leading case upon the rule of damages which it lays down. Hosmer, C. J., delivering the unanimous opinion of the court, further expounded the contract by saying: "If the defendant, when the note was given, did not owe the plaintiff \$250, and this sum is to be considered as a penalty to enforce the contract, what is the value of the stipulation? It is a promise to pay *blank* yards of cotton shirting, and void for uncertainty. Expunge the \$250, or what is virtually the same thing, decide that it is not the real amount of debt, or liquidated damages, and the note contains no criterion by which the number of yards of shirting can be estimated.

shares of the corporate stock of a certain manufacturing company whose capital stock shall be \$100,000, divided into no more than 200 shares, is not fulfilled by a tender of a certificate of ten shares of stock in that company of which only \$35,000 are paid in, divided into 70 shares. And it was also held, that the rule of damages for breach of such promise is the value of ten shares in the full capital stock, if it

had been made up at the time stipulated, and the company had been then ready in good faith to operate upon such capital according to their charter.

¹ Haywood v. Haywood, 42 Me. 229; Alexander v. Macauley, 6 Md. 359; Marshall v. Ferguson, 23 Cal. 65; Burr v. Brown, 5 W. Va. 241. See Currie v. White, 6 Abb. N. S. 352; Moore v. Hudson R. R. Co. 12 Barb. 156.

Now, as the quantity of shirting is not mentioned, it necessarily follows that unless the \$250 is the sum due to the plaintiff, and therefore a standard by which to estimate the value of the contract, there is no certain engagement in words, or by reference, from which the debt can be ascertained. It is admitted by the defendant that if the note had been for \$250, payable in cotton shirting, and there had ceased, that the damages, in the event of non-payment, must be the sum expressed. This surrenders the question in controversy. Why should the above sum be payable in the event expressed? For this convincing reason: because the damages are *liquidated*. But if the damages had been liquidated, the subsequent agreement, that the shirting should be received at thirty cents per yard, can have no possible effect on the prior liquidation. It was not inserted for that purpose, but to obviate the necessity of recurring to parol proof for the ascertainment of the value of the shirting, should it be delivered. For this end the parties agreed on a certain arbitrary valuation, which they anticipated would probably be the real value, but which, in all events, they, for their mutual convenience, agreed to consider as such. This is the whole scope and effect of this latter clause in the note; that the defendant might know how many yards of shirting to deliver, and the plaintiff how much he was entitled to demand, if it should be tendered.

“The case has been argued for the defendant as if there had been a promise to deliver a certain number of yards of shirting, and an omission to deliver them. That would present a question of unliquidated damages, in which resort must be had to parol testimony to ascertain the value of the contract, but it has no imaginable bearing on the case before the court in which the debt is ascertained. It has been contended that in no case can the plaintiff recover a sum greater in amount than the value of the article, which, had it been tendered, would have satisfied the contract. This principle is manifestly incorrect; and is not always true, even when applied to a case where the damages have not been liquidated. In a contract for the transfer of stock on a certain day, the party promising may be relieved by a strict performance of his engagement; but, if he omit to do it, the court will award in damages against him the price of the

stock, although it has risen at the moment when the judgment is rendered.

“The construction which I have given to the note in question is according to the obvious intention of the parties, and perfectly equitable in its result. The sum expressed is to ascertain the indebtedness; that is \$250; and the residue to give an option to the defendant to pay the debt in collateral articles at a stipulated price. If the payment were not made, what must be the expected consequence? That this part of the agreement should be as if it had never existed; and then the whole contract should be comprised in the expression, ‘I promise to pay \$250.’ Nothing can be more conformable to natural justice. The plaintiff will receive the precise sum admitted to be his due, and no more. And if the defendant is in a condition less eligible than he would have been, if he had availed himself of the option allowed him, it was his voluntary choice. After he had renounced the privilege accorded to him, to limit the recovery of the plaintiff by the value of the cotton shirting, would be to give the defendant the abnegated option, in another shape, in defiance of equity, and in opposition to the agreement of the parties.”¹

This view of the law was adopted afterwards in New York. There were earlier decisions in that state to the same effect, but the cases received less consideration. The clause of the contract providing for payment in specific articles, and fixing the value, was deemed to be inserted in the contract for the benefit of the debtor; it offers him a mode of payment which he can adopt or not at his pleasure. The contract thus construed is an alternative contract, authorizing the debtor to pay the sum stated in the contract, in specific articles when due, or in money. The chancellor remarked in the course of his opinion, that “the language is certainly not the best which could be used to express such an intent; and probably if the contract was drawn by a lawyer he would put it in the alternative, giving the debtor the option in express terms to pay the debt in money, or in wheat, at the fixed rate per bushel. But certainly if the intention of the parties was that a certain number of bushels of wheat should

¹ Brooks v. Hubbard, 3 Conn. 58.

be absolutely delivered in payment, a lawyer would draw the note for so many bushels of wheat, in direct terms."¹ In some other states such a contract is construed as an agreement for the delivery of the specific articles, and in case of breach by non-delivery, the rule of damages is the value of the articles and not the sum stated in the contract.² Uninfluenced by any traditional use, or extraneous, practical construction of such contracts in states or localities where they are common, giving them, or tending to give them, by custom, a special meaning which the language does not suggest, they appear to the writer to be contracts, not simply to pay the sum mentioned, but mutually binding to make and receive payment as the instrument specifies; and that upon default of the debtor, the general principle in respect to the quantum of damages which applies, generally, will govern; that is, that the creditor shall receive such sum in damages as will place him in as good condition as though the goods or property had been paid according to the contract. The divergence of the decisions is wholly attributable to the singularity of holding the promise to pay in property at a specified price as not absolutely obligatory; that it imposes no absolute obligation on the debtor, nor confers any right on the creditor. A valid promise, for instance, to pay \$250 in shirting at thirty cents a yard is obviously an absolute promise, in terms, to pay eight hundred and thirty-three and one-third yards; read as the law construes contracts, generally, there is no room for interpretation. The creditor is not only entitled to be paid \$250, but he is entitled to receive it in shirting at that price, and the debtor binds himself to make payment accordingly. If there is a want of directness in the agreement, and it would be more natural to express the intention and legal effect by a direct promise of the number of yards, it may be answered, that it is not a legitimate deduction from this slight circuitry, that the parties do not mean what they say; it is more objectionable to

¹ Pinney v. Gleason, 5 Wend. 393; McDonald v. Hodge, 5 Hayw. 86; West v. Wentworth, 3 Cow. 82; Gregg v. Fitzhugh, 36 Tex. 127; Smith v. Smith, 2 John. 243. See Price v. Justrobe, Harp. 111; Wilson Haywood v. Haywood, 42 Me. 229; v. George, 10 N. H. 445; Mattox v. Trowbridge v. Holcomb, 4 Ohio St. 38. Craig, 2 Bibb, 584; Cole v. Ross, 9 B. Monroe, 393; Starr v. Light, 22 Wis.

² Meason v. Phillips, Addis. (Pa.) 414.
346; Edgar v. Bois, 11 S. & R. 445;

infer that the parties mean something which they have not said, either directly or by any circumlocution. The interpretation which allows the promisor an option to pay the \$250 in money, in satisfaction of his promise, ignores a part of the contract, and treats it as expunged. The promise, as made, is not an absolute promise to pay \$250, either in money or in value. If the shirting should be worth just thirty cents per yard when the pay-day comes, the nominal would be the real value; not otherwise. If the shirting should be worth more than thirty cents per yard, when due, the promise to the extent of that excess would be for more than \$250. Hence by making this contract there is no precise liquidation of indebtedness. Nor is there any implication from the contract that the indebtedness ever existed in any other form. If it in fact did previously exist as an absolute debt for that amount, the action for breach of this contract would not be affected by that circumstance. Doubtless, after a default on this contract, an action might be sustained on the indebtedness in its prior form, as though the promise to pay it in specific articles had never been made; because the making of this contract, in such case, without performance, would not satisfy the debt; receiving it would be only a conditional payment, and after default no payment at all.

In a case in Ohio, where a contract was entered into for work at a certain price, with a stipulation that the same was to be paid for in specific articles at a certain rate and price, the debtor was held to have an election to deliver the articles or pay the money, if such right of election is expressed or fairly to be implied. If not expressed, and the subject matter, or *res gestæ*, indicate that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable, and the contract is a single and imperative promise to deliver the specific articles. If the right of election to pay money or the articles, at the option of the debtor, exists, and the articles are not delivered, the plaintiff should recover the amount of the debt and interest; but if no such election is expressed or implied, the plaintiff is entitled to the market value of the articles with interest.¹

¹Cleveland & P. R. R. Co. v. Kelley, 5 Ohio St. 180. In Harrington v. Wells, 12 Vt. 505, it was held that if one agrees to pay a certain sum in specific articles, worth much less than the agreed price, but fail

CONSEQUENTIAL DAMAGES ON CONTRACTS OF SALE.—The damages which a purchaser is entitled to generally for failure of the vendor to deliver the property contracted are measured by the rules which have been discussed in the preceding pages. Under special circumstances known to the parties at the time of contracting,¹ the damages may be enhanced beyond the real or market value of the property. This is the case when the sale is made for some special use of the property by the purchaser, and where, in consequence of the non-delivery, the buyer in respect to that intended use, sustains damages beyond the value, or the difference between the contract and market price of the property. If a person contracts with another for the sale of personal property, and breaks his contract, the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.² It is but the general rule of damages for breach of contract applied to contracts of sale. If the contract be simply one for merchandise at a certain price, and to be delivered at a certain time and place, the rule of the difference between the contract and market price and interest, affords full compensation; for the vendee may go into the market and purchase like goods at the market price, and thus save himself from loss. Where, however, particular goods, or those of a particular description, are bargained for, for a special purpose, or for delivery at a particular time and place, in view of ulterior contracts or preparations, a failure of the vendor to perform may cause injury which would not be compensated by that rule; but unless that purpose, or the special circumstances from which, in case of default, such consequential damages would proceed, were communicated to the seller when the bargain was made, such damages, though they may arise naturally and proximately from the breach of the contract, are yet exceptional, and cannot be said to have entered into the contem-

to fulfil, he is liable for the sum stipulated.

¹ Vol. I, p. 74.

² Hadley v. Baxendale, 9 Exch.

341; Griffen v. Colver, 16 N. Y. 489; Smeed v. Foord, 1 Ellis & E. 602; 28 L. J. Q. B. 178.

plation of the parties.¹ But if, at the time of contracting, sufficient notice be given of the intended use, or of other and dependent plans, the vendor on failure to deliver, or delaying delivery, will be subject to such damages. Thus, if the buyer has, in advance, made a contract for resale, and discloses that fact to his vendor, who undertakes to furnish the commodity, and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfil his contract for resale, and the vendor fails to deliver the property, he will be liable to damages on the basis of the profits the vendee would realize upon his contract for such resale.² Those profits may justly be said to have entered into the contemplation of the parties in making the contract. This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of contract, he shall, so far as money can do it, be placed in as good a situation, by recovery of damages, as if the contract had been performed.³

A vendor had notice that the vendee was buying the article, caustic soda — an article not ordinarily procurable in the market,—for the purpose of resale at a distance. It was to be delivered, twenty-five tons in June, twenty-five tons in July, and twenty-five tons in August. None was delivered until September, and then only twenty-six tons. If the vendee could have delivered, on his contract, the soda which the vendor failed to deliver, the profit thereon would have been 52*l.* 5*s.* 4*d.* That sum was paid into the court in an action upon the contract. But the vendee had to pay additional cost of transportation on account of the lateness of the season on the part

¹ *Cuddy v. Major*, 12 Mich. 363.

² *Stewart v. Power*, 12 Kan. 596; *Watson v. Bates*, 5 U. C. C. P. 366; *Johnson v. Matthews*, 5 Kan. 122; *Morrison v. Lovejoy*, 6 Minn. 319; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422.

³ *Messmore v. New York Shot & Lead Co.* *supra*. It was also held in this case, that where the article furnished by the seller was not such as the purchaser was entitled to,

and the seller was notified to that effect, the purchaser had a right to sell it at the place of delivery for the best price he could obtain, without giving notice to the defendant of the time and place of such sale; that after such sale he could recover from the vendor the difference between the sum so realized, and the sum stipulated by the contract of resale.

delivered, and a certain sum to the sub-vendee for damages on the sub-contract for loss of profits on a resale by him. The court held the vendee was entitled to recover as damages for the defendant's breach, the loss of the profit the plaintiff would have derived from the transaction if the defendant had delivered the soda pursuant to his contract. He was held liable for the increased cost of transportation, but not for the damages paid to the sub-vendee. The latter were too remote. On this point Erle, C. J., said: "The defendant had notice at the time of entering into the contract with the plaintiffs that they had contracted with one purchaser on the continent. For the damages resulting from that, it is agreed that he is responsible. But he had no notice of the subsequent resale; and it is not to be assumed that the parties contemplated that he was to be held responsible for the failure of any number of sub-sales. These could not in any sense be considered as the direct, natural or necessary consequences of a breach of the contract he was entering into."¹

In assessing damages against a vendor for breach of a contract to deliver certain bridge timber to be manufactured by him, where the purchaser had procured it otherwise at an increased cost, the court held that if the course pursued by the purchaser in obtaining the timber was the only way in which it could be obtained, or was the ordinary and usual, or a reasonable and prudent way of obtaining it, the difference between the contract price and the higher cost of the timber thus obtained might be recovered as damages naturally arising from the breach itself. If the course pursued by the purchaser was not the ordinary and usual way, and would not be a reasonable or prudent way, were it not for an engagement into which the purchaser had entered with a third party for the completion, within a limited time, of the bridges for which the timber was contracted to be furnished, the purchaser cannot recover the increased cost he has been obliged to incur in order to fulfil such engagement, unless the nature of the engagement was

¹ *Borries v. Hutchinson*, 18 C. B. 265; *Sawdon v. Andrew*, 30 L. T. 23; *N. S.* 445; *Gesellschaft von Eisenbahn v. Armstrong*, L. R. 9 Q. B. 473; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61.

known to the vendor at the time the contract was made. But if so made known, the purchaser may recover the difference between the contract price and the higher cost, at which, acting in good faith, and with reasonable diligence and prudence, he has been obliged to obtain the kind and quantity of timber contracted for in order to fulfil his engagement; for these damages may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of a breach.¹

DAMAGES FOR DELAY.—Damages for delay in delivery of property sold or contracted for may be recovered according to circumstances. Where it has been paid for, the jury may allow, where there is no proof of special damage, interest on the price of the article from the time it should have been until it actually is delivered.² If there has been a decline in the market value at the time of the delayed delivery, damages for the delay may be assessed at the amount of the depreciation.³ In *Merrimack Manufacturing Co. v. Quintard*⁴ it was held that, inferior coal having been delivered after the contract time, the vendee was entitled to the difference between the value at the place of delivery of the coal called for by the contract, and the value of the coal delivered, as damages for the inferior quality; and that the measure of damages for failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance which had to be paid by the purchaser, and the average rate during the time covered by the contract for monthly deliveries. It was also held that evidence was admissible that freight on coal was usually higher in the autumn than in summer, to show what was in contemplation of the parties, and that the loss occasioned by the increase in freight is properly to be recovered in damages. But it has been held in a recent case, that compensation for delay in delivering plank intended for a plank road does not

¹ *Paine v. Sherwood*, 21 Minn. 225; *Startup v. Cortazzi*, 2 Cr. M. & R. 165; *Clements v. Hawkes Manuf'g Co.* 107 Mass. 362.
Feehan v. Hallenan, 13 U. C. Q. B. 440.

² *Edwards v. Sanborn*, 6 Mich. 348.

⁴ 107 Mass. 127.

³ *Speirs v. Halstead*, 74 N. C. 620;

include the increased expense of laying the plank by reason of such delay; that such damages are too indefinite.¹ Sharswood, J., said: "To say that the increased expense of labor in putting down the planks in consequence of such delay would be such an immediate and proximate effect as ought to be charged to the common carriers, seems to be entirely too indefinite. It would include a rise in wages, stormy weather, bad roads in consequence, which would be entirely beyond what would naturally have been within the view of the parties, and might well have happened even had the railroad company punctually performed their duty. The natural consequences of delay and stoppage of work, payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been, form the rule."² Where the defendant agreed to construct a ship which he knew was intended for a passenger ship to Australia, and special damages were claimed for delay in completing it, in this, that if the ship had been delivered according to the contract, the plaintiffs would have made a profit of £7,000 on the voyage, but, in consequence of a fall in freight, they made only £4,280 on the voyage after the vessel was delivered, the jury gave a verdict for the plaintiff for £2,750 damages, which the court refused to set aside.³

A vendor agreed to deliver by a stipulated day a steam engine, intended, as he knew, to drive certain machinery for the sawing and planing of lumber. It was not delivered till a week after the day fixed. In the assessment of damages for the breach of contract in this delay, the vendee proved that the net average value of the engine at the time and place, and for the purpose intended, was \$50 a day beyond the wear and tear of the machinery and the cost of running it. This result was obtained by a calculation of the wear and tear of the machinery, of the cost of running it, and of the amount of lumber it would saw and plane in a day, together with the prices which the vendee received for the sawing and planing. This mode of arriving at the damages was rejected. It was held that the

¹ Penn. R. R. Co. v. Titusville, etc.
Co. 71 Pa. St. 350.

² Id.

³ Fletcher v. Tayleur, 17 C. B. 21.
See Blanchard v. Ely, 21 Wend.
342.

proper rule for estimating the damages was to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of business.¹ Some general principles were laid down in the decision of this case which have been extensively quoted with approval. It was held that the rule which precludes the allowance of profits by way of damages is not a primary rule, but a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained; that it is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; that it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. It was remarked that nearly every element entering into the vendee's computation of damages would have been of that uncertain character which has uniformly prevented a recovery for speculative profits. Selden, J., said: "The broad general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

"The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

¹Griffin v. Colver, 16 N. Y. 489.

"These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach; and yet, if in their nature uncertain, they must be rejected. . . . So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but for some special circumstances, collateral to the contract itself, or foreign to its apparent object, they cannot be recovered."¹

In a suit to recover damages for the non-delivery of a planing machine, it appeared that the plaintiff, a resident of Iowa, came to the defendant's warehouse in Chicago and bought the machine, which he selected with reference to its weight and finish. He paid \$100 in hand, and was to pay \$450 more on the delivery of the machine at his residence in Iowa. The contract was that he was to have the identical machine he had selected. The machine was to be shipped when ordered. The plaintiff returned home to put up his shafting and pulleys, with the understanding that he was to send for the machine as soon as he should be ready to put it up. He ordered it by letter on the 13th or 14th of March, and after a delay of fifteen or sixteen days, received a letter saying that a machine had been shipped to him. He declined to receive any machine except the one he bought; he demanded it, and it was refused on the 13th of April, and on the same day he bought another machine. On the trial the plaintiff offered to prove that he had erected a building, and put in a steam engine and shafting at an expense of \$5,000, with a view to the use of this machine; that the defendant had notice of this when the contract was made; that it all lay idle for thirty-five days, in consequence of the defendant's breach of his contract. It was held that such evidence was admissible; that, in arriving at the damages which the plaintiff was entitled to recover, he should be allowed to show what would have been a fair rent for the use of the building and machinery, if in running order, during the time they lay idle in consequence of the defendant's refusal to

¹ Freeman v. Clute, 3 Barb. 424; vol. I, pp. 94, 106.

deliver the machine; though he should not be allowed for any longer time than was reasonably necessary for supplying himself with another machine of similar character, after being advised of the defendant's refusal to send the machine purchased; and should not be allowed anything for probable profits.¹

A recent English case illustrates these principles in a striking manner. The defendant had contracted to furnish a steam threshing machine on a fixed day, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field, so that it could be sent at once to market. He failed to deliver the machine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by a thunder-storm, and it was necessary to kiln-dry a part of it; its market value was thereby diminished, and before it could be sold the market price had fallen. It was held, the plaintiff was entitled to recover damages for the expense of carting and stacking the wheat, for the loss by reason of the exposure to the weather, including the expense of kiln-drying. In respect to these items, Lord Campbell, C. J., said: "The plaintiff, who was a large farmer, was known by the defendant to be accustomed to thresh out his wheat in the field; he gave the order for the threshing machine, which, it was agreed, should be delivered on the 14th of August, at which time the wheat might reasonably be expected to be ripe for threshing; the defendant knew that it was wanted for that purpose. Then, was it not in the contemplation of the parties that, if it was not delivered at that time, damage by rain might ensue to the plaintiff? The thunder-storm occurred, and the plaintiff's wheat was damaged. If the engine had been delivered at the time agreed upon, the corn would have been threshed out, and would have been carried to market in good condition, instead of which it was damaged. Is not this injury a natural consequence of the breach of contract? And may it not reasonably be supposed to have been foreseen by the parties? . . . Therefore, as respects those items for which the plaintiff claims damages, as resulting from the falling of the rain, I am of opinion that he is entitled to recover. But, as respects the fall of the

¹Benton v. Fay, 64 Ill. 417

market price of wheat, in respect of which he claims damages, my opinion is quite different; because it could not have been foreseen by the parties that the market would fall; it was not in the contemplation of the parties at the time they made the contract, and was not the natural consequence of the breach of contract."¹ This discrimination between a loss from exposure to rain and loss from fall in the market price does not appear to have caused any criticism, although the case has been frequently referred to.² The latter loss, however, arose as proximately from the delay in furnishing the machine as the other loss did; neither could have been foreseen; both did occur; and the parties must have known when the bargain was made, that, if the vendor delayed performance, a loss from rain or from fall in the market was equally possible. The machine was relied upon to do the threshing, and the circumstances were such that the court held that the plaintiff was entitled to rely upon it. Had the storm destroyed the entire crop, notwithstanding such exertions of the plaintiff to prevent it as the law required him to make, the defendant, on the principle of the decision, would have been liable for its value; and that value would be the market value at the time of the loss, or at the date when, by reason of the breach of contract, the plaintiff was prevented from realizing the value by sale. On the principle that the in-

¹Smeed v. Foord, 1 Ell. & Ell. 602; 28 L. J. Q. B. 178.

²In the last edition of *Mayne on Damages*, edited by Mr. Wood, the text has been rewritten to some extent and enlarged. The following paragraph has been added in respect to *Smeed v. Foord*: "The concluding part of the above ruling was put upon a finding of fact, viz.: that the parties could not have contemplated a fall in the market as one of the natural consequences of a breach of contract. Upon this point, however, it is difficult to see the distinction between this case and the other cases quoted below: *Collard v. S. E. Ry. Co.* 7 H. & N. 79; *L. J. Ex.* 393; *Borries v. Hutch-*

inson, 18 C. B. N. S. 445; 34 L. J. C. P. 169; *Ward v. N. Y. Cent. R. R. Co.* 47 N. Y. 29. If the defendant had undertaken to thresh the plaintiff's wheat, and hand it over to him, and, in consequence of his delay, the market had fallen, these cases decide that the loss so incurred would have been part of the natural loss arising from breach of contract. Here the defendant only undertook to supply him with a threshing machine. But every consequence which legally followed from the breach of the contract to thresh, followed as an equally natural consequence from a breach of contract to supply the means of threshing." *Wood's Mayne on Damages*, 35.

jured party is to be placed in as good a situation by damages as he would have been in if the contract had been performed, the value should be assessed, in the case supposed, at the time when, but for the defendant's breach of contract, the wheat would have been taken to market. In the actual case, the plaintiff was entitled to that measure of damages, less the value of what he was able to save from destruction by the precautions he took and was required to take. As the plaintiff's exertions, for this purpose, were rendered necessary by the defendant's breach of contract, he was bound to make compensation for them; he was relieved thereby from paying the value of a totally lost crop.¹ The net amount saved was its value, then, after satisfying the charges for the saving; and this, taken from the total value which would otherwise have been lost, would leave, according to familiar analogies, the amount of the plaintiff's actual loss. By this method of computation, the loss from a decline in the market would fall on the defendant.²

The agreement of a carrier to deliver is like a vendor's agreement to deliver, and the same rule of damages is applied. A loss from a fall in the market at the time of a delayed delivery is deemed a loss arising directly from the breach of contract.³ Here the liability would end, if the whole property were finally delivered without diminution or deterioration, unless there are special circumstances which enter into the contract and give it more scope. A contract to deliver a threshing machine at a given time, to enable a farmer to thresh his wheat, with a view to its being taken at once to market, is not simply a contract to deliver a machine; it is a contract to do, at a specified time, one of a known series of acts, for the purpose of getting the wheat immediately to market.

¹ Vol. I, p. 148.

² See *Ward v. The N. Y. Central R. R. Co.* 47 N. Y. 177; *Collard v. South Eastern Ry. Co.* 7 H. & N. 79; *The Parana, L. R.* 1 P. D. 452.

³ *Ward v. The N. Y. Central R. R. Co.* supra; *Sturgess v. Bissell*, 46 N. Y. 462; *Weston v. Grand Trunk R. R. Co.* 54 Me. 376; *Peet v. Chicago, etc. R. R. Co.* 20 Wis. 594;

Medbury v. N. Y. & C. R. R. Co. 26 Barb. 564; *Sisson v. Cleveland, etc. R. R. Co.* 14 Mich. 489; *Briggs v. N. Y. R. R. Co.* 28 Barb. 515; *Colvin v. Jones*, 3 Dana, 576; *Cowley v. Davidson*, 13 Minn. 92; *Collins v. Baumgardner*, 52 Pa. St. 461; *Atkisson v. Steamboat C. G.* 28 Mo. 124; *Smith v. N. H. etc. R. R. Co.* 12 Allen, 531; *Wilson v. Lancashire*

ON WARRANTIES.—Whether a warranty exists is often a difficult question. On an executory contract for the sale and delivery of goods of a particular description, the vendee is not obliged to receive and pay for any, when offered, unless they are of that description. The contract to furnish such goods is strictly a precedent condition. When the vendor offers the goods upon such a contract, the legal maxim *caveat emptor* warns him to make due examination, and reject them if they do not conform to the requirements of the contract. If they are apparently goods of the kind so required, are tendered on the contract, and unconditionally received without objection, all objection is waived in respect to any want of conformity to the contract which could have been ascertained by a careful examination. The tender and acceptance make the contract an executed one for a sale and purchase of specific articles.

It is not always practicable or possible, by any inspection at the time of delivery, to determine whether property offered upon an existing contract, or for sale, possesses certain qualities which the purchaser is charged for in the price. To some extent the law implies a warranty; but beyond this, the purchaser must assure himself against loss from defects or want of fitness for his purpose by inspection, or by obtaining a warranty.

The vendee is entitled to an opportunity to make such examination of the goods offered on an existing contract as will enable him to ascertain whether they fulfil its requirements; and if the goods are of such a nature that qualities or fitness stipulated for can only be ascertained by the use or consumption of the property, or for any reason is not intended to be ascertained before the title passes, the contract in respect to the qualities is a warranty. Such a case is precisely like any bargain and sale with a representation or warranty of qualities or fitness.¹

R. R. Co. 9 C. B. N. S. 632; Ingle-dew v. Northern R. 7 Gray, 88; Spring v. Haskell, 4 Allen, 112; Cutting v. Grand Trunk, etc. 13 id. 381.

¹ Day v. Pool, 52 N. Y. 416; Foot v. Bentley, 44 N. Y. 166; Howie v. Rea, 70 N. C. 559; Polehemus v. Heiman, 45 Cal. 573; Thomas v. Francis, 12 Ind. 282; Esty v. Read,

29 Vt. 278; Dounce v. Dow, 57 N. Y. 16; Hoe v. Sanborn, 21 N. Y. 532; Bruntly v. Thomas, 22 Tex. 270; Parks v. Morris Ax, etc. Co. 54 N. Y. 586; Baird v. Mathews, 6 Dana, 130; Lewis v. Roundtree, 78 N. C. 323; Pease v. Sabin, 38 Vt. 432; Walcott v. Mount, 36 N. J. 262; Boothby v. Scales, 27 Wis. 626; Howard v.

But in case of a sale of specific goods, there being no undertaking to furnish those of particular quality or fitness; and when goods are delivered on an existing contract requiring a particular quality, the absence or presence of which can be seen on mere view; in such cases, the purchase is without warranty; or the acceptance without objection, leaves the seller relieved of all responsibility for the goodness, quality or fitness of the property.¹ But if the goods delivered differ from those contracted for in kind or generic description, and there is no other acceptance than receipt and use of the goods furnished, the intention to deliver or accept them on the contract will not be inferred, and the vendor will only be entitled to recover for them on a *quantum meruit*.² In a recent case, Mellor, J., sums up and thus classifies the English cases: "First. Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.³ The buyer in such case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case, it is not an implied term of the contract of sale, that the goods are of any particular quality, or are merchantable.⁴ So in the

Hoey, 23 Wend. 350; Murray v. Smith, 4 Daly, 277; Seigworth v. Leffel, 76 Pa. St. 476; Brown v. Burhons, 4 Hun, 227; Kimball, etc. Co. v. Vroman, 35 Mich. 210; Dill v. O'Ferrell, 45 Ind. 268; Cox v. Long, 69 N. C. 7.

¹ Howard v. Hoey, 23 Wend. 350; Hart v. Wright, 17 Wend. 267; Locke v. Williamson, 40 Wis. 377; Delafield v. DeGrauw, 3 Keyes, 467; Muller v. Eno, 3 Duer, 421; S. C. 14 N. Y. 597; Wilkins v. Stevens, 8 Vt. 214; Houghton v. Carpenter, 40 Vt. 588; Reed v. Randall, 29 N. Y. 358; Fitch v. Carpenter, 43 Barb. 40; Cole v. Champion Transp. Co. 26 Vt. 87; Barnard v. Kellogg, 10 Wall. 388;

Hyatt v. Boyle, 5 Gill & J. 110; Hargous v. Stone, 5 N. Y. 73; Merriam v. Field, 39 Wis. 578; McClung v. Kelley, 21 Iowa, 508; Hamilton v. Gangard, 34 Barb. 204; Clew v. McPherson, 1 Bosw. 480; Morehouse v. Comstock, 42 Wis. 626; Jones v. Murray, 3 T. B. Mon. 83; Emerson v. Bingham, 10 Mass. 197; Moses v. Mead, 1 Denio, 378; 5 id. 617; Hyland v. Sherman, 2 E. D. Smith, 234; Gaylord M. & Co. v. Allen, 53 N. Y. 515; Ranger v. Hearne, 37 Tex. 30.

² Murray v. Farthing, 6 Mo. 251; Andrews v. Eastman, 41 Vt. 134.

³ Parkinson v. Lee, 2 East, 314.

⁴ In Hinkley v. Kersting, 21 Ill. 247, it was held that the rule of

case of a sale in the market of meat, which the buyer had inspected, but which was in fact diseased and unfit for food, and the maxim *caveat emptor* applies.¹ Secondly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.² Thirdly. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose; still, if the known, defined and described thing be actually supplied, there is no warranty; there is no warranty that it shall answer the particular purpose intended by the buyer.³ Fourthly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.⁴ In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.⁵ Fifthly. Where a manufacturer undertakes to supply

caveat emptor applies to a banker or broker who deals in depreciated bills, as an article of commerce; and if a bank bill purchased by him proves to be of less value than the price given for it, the vendor is not bound to make it good, where the transaction is in good faith.

¹Emerton v. Matthews, 7 H. & N. 586; 31 L. J. Ex. 139. See post, p. 410.

²Burr v. Gibson, 3 M. & W. 390. See ante, p. 408; Kohl v. Lindley, 39 Ill. 195; Humphreys v. Comline, 8 Blackf. 516; McGuire v. Kearney, 17 La. Ann. 295; Deming v. Foster, 42 N. H. 165; Moses v. Mead, 1 Denio, 378; Mixer v. Coburn, 11 Met. 559; Joslin v. Coughlin, 26 Miss. 134; Holden v. Dakin, 4 John. 421; Bartlett v. Hoppock, 34 N. Y. 118; Bowman v. Clemmer, 50 Ind. 10; Fountleroy v. Wilcox, 80 Ill. 477; McCrea v. Longstreet, 17 Pa. St. 316.

³Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bailey, 5 Q. B. 288; Dounce v. Dow, 61 N. Y. 411; Deming v. Foster, 42 N. H. 165; McGraw v. Fletcher, 35 Mich. 104; Bragg v. Morrill, 49 Vt. 45.

⁴Brown v. Edgerton, 2 M. & G. 279; Jones v. Bright, 5 Bing. 533.

⁵Hoe v. Sanborn, 21 N. Y. 552; Beals v. Olmstead, 24 Vt. 114; Brown v. Sayles, 27 Vt. 227; Sims v. Howell, 49 Ga. 620; Parks v. Morris, etc. Co. 54 N. Y. 586; Gammell v. Granby, 52 Ga. 504; Richardson v. Grandy, 49 Vt. 22; Whitmore v. South Boston Iron Co. 2 Allen, 58; Dutton v. Gerish, 9 Cush. 89; French v. Vining, 102 Mass. 135; Mallan v. Ruddolph, 17 C. B. N. S. 588; Gossler v. Eagle Sugar Refinery, 103 Mass. 331; Leopold v. Van Kirk, 27 Wis. 152; Brown v. Murphee, 31 Miss. 91; Robinson M. Works v. Chandler, 56 Ind. 575; Brunton v. Davis, 8 Blackf. 317;

goods manufactured by himself, or in which he deals, but which the vendor has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article."¹

It might be inferred, from what is said of the first class, that no distinction is observed between articles purchased for food, and other merchandise; that if a purchaser has an opportunity for inspection, there is no implied warranty that the provisions are sound and wholesome. But it is believed that in all sales of provisions for consumption there is an implied warranty, in this country.² In case of a sale by sample, there is an implied warranty that the bulk of the goods sold is equal in quality to the sample.³ And the description or

Orton v. Phelan, 2 Head, 445; Beers v. Williams, 16 Ill. 69; Boyd v. Crawford, Addis. (Pa.) 150; Cunningham v. Hall, 1 Sprague, 404; Walton v. Cody, 1 Wis. 420.

¹ Laing v. Fidgeon, 4 Camp. 169; 6 Taunt. 108; Mann v. Everston, 32 Ind. 355; Leopold v. Van Kirk, 27 Wis. 152; Walton v. Cody, 1 id. 420; Gaylord Manuf'g Co. v. Allen, 53 N. Y. 515; Howard v. Hoey, 23 Wend. 350; Hamilton v. Ganyard, 34 Barb. 204; Morehouse v. Comstock, 42 Wis. 626; Ketchum v. Wells, 19 id. 25; Clew v. McPherson, 1 Bosw. 480; McClung v. Kelly, 21 Iowa, 508; Meriam v. Field, 39 Wis. 578. See Holden v. Clancy, 41 How. Pr. 1.

² Winsor v. Lombard, 18 Pick. 57; Hoover v. Peters, 18 Mich. 51; Divine v. McCormick, 50 Barb. 116; Davis v. Murphy, 14 Ind. 158; Osgood v. Lewis, 2 Harr. & G. 495; Emerson v. Brigham, 10 Mass. 197; Van Bracklin v. Fonda, 12 John. 438; Marshall v. Peck, 1 Dana, 612; Humphreys v. Comline, 8 Blatchf. 516; Ryder v. Neitge, 21 Minn. 70; Moses v. Mead, 1 Denio, 378; S. C. 5 id. 617; Hart v. Wright, 17 Wend. 267; Hyland v. Sherman, 2 E. D. Smith, 234; Goldrich v. Ryan, 3 id. 324; French v. Vining, 102 Mass.

132. See Howard v. Emerson, 110 Mass. 320.

In Benj. on Sales, § 672, it is said that the responsibility of a victualler, vintner, brewer, butcher or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any damage caused by their sale of unwholesome food. Bumby v. Bollett, 16 M. & W. 644. See Chitty on Cont. 420; 3 Black. Com. 166.

³ Oneida Manuf'g Co. v. Lawrence, 4 Cow. 440; Andrews v. Kneeland, 6 Cow. 354; Sands v. Taylor, 5 John. 395; Gallagher v. Warring, 9 Wend. 20; Beebe v. Robert, 12 Wend. 413; Boorman v. Johnston, id. 566; Moses v. Mead, 1 Denio, 386; Brower v. Lewis, 19 Barb. 574; Beirne v. Dord, 1 Seld. 95; Hargous v. Stone, id. 73; Messenger v. Pratt, 3 Lans. 234; Leonard v. Fowler, 44 N. Y. 289; Gurney v. Atlantic, etc. Co. 58 id. 358; Williams v. Spofford, 8 Pick. 250; Hastings v. Levering, 2 Pick. 219; Lathrop v. Otis, 7 Allen, 435; Borrekens v. Bevan, 3 Rawle, 37; Rose v. Beattie, 2 Nott. & McC. 538; Bradford v. Manly, 13 Mass. 139; Henshaw v. Robins, 9 Met. 86;

name by which goods are sold is a warranty that the goods are such as are known or pass by that description or name.¹ There is an implied warranty of title, but only when the vendor has possession of the property sold.² But sales by executors, administrators and other trustees are exceptions; there is no warranty of title in sales by them, unless there be fraud or express

Whittaker v. Huiske, 29 Tex. 355; Carson v. Baillie, 19 Pa. St. 375; Bruntley v. Thomas, 22 Tex. 270.

¹Bridge v. Wain, 1 Stark. 504; Bannerman v. White, 10 C. B. N. S. 844; Behn v. Burniss, 3 B. & S. 755; Chanter v. Hopkins, 4 M. & W. 404; Allon v. Lake, 18 Q. B. 560; Josling v. Kingsford, 13 C. B. N. S. 447; Hawkins v. Pemberton, 51 N. Y. 204; Osgood v. Lewis, 2 Harr. & G. 495; Henshaw v. Robins, 9 Met. 83; Borrekens v. Bevan, 3 Rawle, 23; White v. Miller, 71 N. Y. 118.

²Seranton v. Clark, 39 Barb. 273; 39 N. Y. 220; Brown v. Smith, 53 How. (Miss.) 387; McCoy v. Artcher, 3 Barb. 323; Grass v. Kierski, 41 Cal. 111; Thurston v. Spratt, 52 Me. 202; Boyd v. Whitfield, 19 Ark. 447; Scott v. Hix, 2 Sneed, 192; Miller v. Van Tassel, 24 Cal. 458; Bennett v. Bartlett, 6 Cush. 225; Case v. Hall, 24 Wend. 101; Vibbard v. Johnson, 19 John. 77; Dorr v. Fisher, 1 Cush. 271; Burt v. Dewey, 40 N. Y. 283; Williamson v. Summers, 34 Ala. 691; Linton v. Porter, 31 Ill. 107; Chancellor v. Wiggins, 4 B. Mon. 201; Trigg v. Farris, 5 Humph. 343; Charlton v. Lay, *id.* 496; Hale v. Smith, 6 Greenlf. 416; Butler v. Tafts, 13 Me. 302; Bucknam v. Goddard, 21 Pick. 70; Huntington v. Hall, 36 Me. 501; Ravis v. Smith, 7 Minn. 414; Chism v. Woods, Hardin, 531; Robinson v. Rice, 20 Mo. 229; Payne v. Rodden, 4 Bibb, 304; Gookin v. Graham, 5 Humph. 480; Word v. Carin, 1 Head, 506; Whitney v. Heywood, 6 Cush. 82; Sargent v. Cur-

rier, 49 N. H. 310; Emerson v. Brigham, 10 Mass. 197; Pratt v. Philbrook, 41 Me. 132; Darst v. Brockway, 11 Ohio, 462; Lines v. Smith, 4 Fla. 47; McCabe v. Morehead, 1 W. & S. 513; Cozzens v. Whittaker, 3 S. & P. 322; Scott v. Scott, 1 A. K. Marsh. 217; Inge v. Bond, 3 Hawks, 101; Calcock v. Goode, 3 McCord, 513; Storm v. Smith, 43 Miss. 497; Shattuck v. Green, 104 Mass. 42; Long v. Hickingbottom, 28 Miss. 772; Mockbee v. Gardner, 2 Harr. & G. 176; Coolidge v. Brigham, 1 Met. 551.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guarantied to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties; on breach of the contract, where no special damage is alleged, the measure of damages is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then, if the vendee is prepared to gather it and carry it to market, the market value there, less the cost of gathering and carriage.

If other persons were in possession of the orchard when vendee went there to gather the fruit, and if those persons forbade him or his agents or servants from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal

warranty and eviction; in which case they would undoubtedly be personally responsible.¹ In case of a failure of title while the purchase money remains in their hands, undistributed or unadministered, it is suggested that there would exist no well founded reason why they should not refund to the purchaser.² Caveat emptor applies in all its rigor to judicial sales.³

It is said by a learned author that the rule in England, at present, may be stated in the following terms: A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.⁴

On the sale of a promissory note, bill of exchange, shares, or other securities or choses in action, there is an implied warranty of the assignor's title, of the genuineness of the evidence of debt or other instrument assigned, and the capacity of the makers to contract.⁵ The party accepting the transfer is at lib-

collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold defendant responsible on the guaranty, as he was not bound to take a portion of the contract. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 171.

¹ *Mockbee v. Gardner*, 2 Harr. & G. 176.

² *Id.*

³ *Corwin v. Benham*, 2 Ohio St. 36. See *The Monte Alegro*, 9 Wheat. 616.

⁴ *Benj. on Sales*, § 639; *Hall v. Conder*, 2 C. B. N. S. 22; *Smith v. Neale*, *id.* 67; *Chapman v. Speller*, 14 Q. B. 621; *Sims v. Marryat*, 17 *id.* 281; *Eichholz v. Bannister*, 17 C. B.

N. S. 708; *Bagneley v. Hawley*, L. R. 2 C. P. 625.

⁵ *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Ledwick v. McKim*, 53 *id.* 307; *Erwin v. Downs*, 15 *id.* 575; *Bell v. Dugg*, 60 *id.* 528; *Sherman v. Johnson*, 56 Barb. 59; *Thrall v. Newell*, 19 Vt. 202; *Smith v. McNair*, 19 Kan. 330; *National Bk. v. Bangs*, 106 Mass. 441; *Lobdell v. Baker*, 1 Met. 193; S. C. 3 *id.* 469; *Terry v. Bissell*, 26 Conn. 23; *Wilder v. Cowles*, 100 Mass. 487; *Cabot Bank v. Morton*, 4 Gray, 156; *Merriam v. Wolcott*, 3 Allen, 258; *Shaver v. Ehle*, 16 John. 201; *Markle v. Hatfield*, 2 *id.* 455; *Herrick v. Whitney*, 15 *id.* 240; *Murray v. Judah*, 6 Cow. 484; *Flynn v. Allen*, 57 Pa. St. 482; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Aldrich v. Jackson*, 5 R. I. 218; *Ellis v. Groom*, 1 Stew. 47; *Bennett v. Buchan*, 61 N. Y. 222; *Furniss v. Ferguson*, 34 *id.* 485.

In *Harloe v. Foster*, 53 N. Y. 385,

erty to act upon the implied assertion of the validity of the paper, and to bring an action for its collection; ¹ and if defeated may recover the costs and expenses so incurred.² In case of contest and adverse judgment, the vendor will be concluded by it, if he has had notice of the action and an opportunity to be heard.³

The indorsement of a promissory note imports a guaranty that the maker was competent to make the note in the character and in the terms in which it was made.⁴ The drawee in a forged check who has paid it, after indorsement by the payee named therein, may recover back the money from such indorser, if he has given currency to such check by his indorsement made without due inquiry.⁵ The measure of damages for breach of this implied warranty is the difference between the value of the paper as it is, and the value it would possess if the warranty had been true; or, if the instrument is void for a cause within the warranty, the assignee is entitled to recover what it would have been worth if conformable to the implied assurance; or, at least, the consideration and interest.⁶

Where a judgment against four defendants was assigned, and one of them had been released, it was held that the as-

it was held that where a creditor unites with others in the release of their debtor, and signs off for a demand which he has previously transferred, he impliedly undertakes to protect the debtor from such demand; and upon payment being enforced against the debtor, he can recover from the creditor, although the release was made upon only a nominal consideration.

Where J made a contract to sell the promissory note of C to L, when he was not its owner, and it was not in his possession, it was held that the purchase was at the risk of L; that the law implied no warranty by J that he had title to the note; that although J subsequently acquired the title, this did not enure to the benefit of L, so as to render effectual

a payment by C to L in extinguishment of the note. *Scranton v. Clark*, 39 Barb. 273. An assignment of a judgment without recourse implies no warranty that the record is free from error. And on reversal there is no remedy to recover back the purchase money. *Glass v. Reed*, 2 Dana, 168. A refusal to guaranty does not of itself exclude an implied warranty of genuineness. *Bell v. Dugg*, 60 N. Y. 528.

¹ *Delaware Bank v. Jarvis*, 20 N. Y. 226.

² *Giffert v. West*, 33 Wis. 617.

³ *Bell v. Dugg*, 60 N. Y. 528.

⁴ *Erwin v. Downs*, 15 N. Y. 575.

⁵ *National Bank v. Bangs*, 106 Mass. 441.

⁶ *Giffert v. West*, 33 Wis. 617.

sign ee was entitled to recover the difference in value between a judgment against all, and its value with one released.¹

In England the vendor's liability is not based on the notion of a warranty, but on the obligation in the contract of sale itself to deliver, as a condition precedent, that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.² The vendee in such cases can only recover back the price paid.³

In South Carolina a contract of sale for a full price paid for

¹Bennett v. Buchan, 61 N. Y. 222. In Thrall v. Newell 19 Vt. 202, the defendant had executed a written assignment in these words: "I hereby assign to R H T a note in my favor against T W and J H P, dated 13th November, 1838, for \$150, payable in one year from date, with use, for value received." It was held that the words "for value received" were not merely descriptive of the note assigned, but that *prima facie*, at least, they imported a sufficient consideration for the assignment; it was also held that such an instrument, describing the property assigned as "a note," must be construed as an express warranty, on the part of the defendant, that it was a valid note; and that the signers were of sufficient capacity to contract, when they executed it; and quere, whether such a warranty would not be implied from the sale without words indicating an express warranty. And it appearing that the note was invalid as to one of the makers, by reason of his insanity, and that an action upon the note had been successfully defended by him on that ground, and that the other had removed from the state, it was held that the plaintiff, in an action upon the warranty contained in the assignment, was entitled to recover the difference between the actual value of the note and the

amount appearing due upon it. See Marshall v. Peck, 1 Dana, 612. In Pacific Iron Works v. Newhall, 34 Conn. 67, the plaintiff agreed to manufacture and sell to the defendant for his use in his business, a steam engine with a cut-off known as "Green's Patent Cut-off," for which they represented that one Green had a patent, and that they had a license from him to make and sell the same. And that the same would be of great value to the defendant in connection with the engine, all which representations were untrue. The whole was to be for one agreed price, for which the defendant gave his notes when the engine was delivered. After he had used it for a few months another person claimed the cut-off to be an infringement of his own prior patent, and obtained an injunction against its use by the defendant. Held, that there was a failure of consideration to the extent of the value of the cut-off, to the defendant, in connection with the engine, and that that amount should be deducted from the price.

²Benj. on Sales, § 607; Jones v. Ryde, 5 Taunt. 488; Young v. Cole, 3 Bing. N. C. 724; Gompertz v. Bartlett, 2 E. & B. 849; Westropp v. Solomon, 8 C. B. 345.

³Id.

an article always implies a warranty of its soundness.¹ But the parties may agree that the vendee shall take the property at his own risk;² nor will the warranty be implied if the vendor be not in possession of the property which he sells;³ nor against visible defects.⁴

This implied warranty of soundness will exist though there is an express warranty of title;⁵ and even though the contract be in writing and under seal,⁶ if the contract is silent on the subject of soundness. A similar rule prevails in Louisiana.⁷ The rule in those states is derived from the civil law.

Implied warranties are excluded when there is an express warranty on the same subject.⁸ And it has been held in some states, that where the contract of sale is in writing and contains no warranty, none can be established by parol.⁹ But in such cases it has been held that the silence of the written contract of sale does not negative the implied warranty of title.¹⁰

No particular form of words is required to constitute a warranty; any positive affirmation of facts, as distinguished from an expression of opinion, intended as a warranty, or received

¹ *Toris v. Long*, Taylor, 13; *Simons v. Walter*, 1 McCord, 70; *Rivers v. Gragett*, 1 McCord, 71; *Thompson v. Lindsay*, 3 Brev. 403; *Wood v. Ashe*, 3 Strobb. 64; *Vaughan v. Campbell*, 1 Brev. 478; *Colcock v. Goode*, 3 McCord, 302.

² *Thompson v. Lindsay*, *supra*.

³ *Galbraith v. Whyte*, 1 Hayw. 535.

⁴ *Id.*; *Wood v. Ashe*, 3 Strobb. 64. See *Furman v. Miller*, 1 Brev. 536.

⁵ *Pender v. Fobes*, 1 Dev. & Batt. 250; *Houston v. Gilbert*, 3 Brev. 216; *Wells v. Spears*, 1 McCord, 421.

⁶ *Wood v. Ashe*, *supra*; *Hughes v. Banks*, 1 McCord, 537.

⁷ *Bulkley v. Harrold*, 19 How. U. S. 390. Louisiana Civil Code, art. 1764: "There are things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them but which

the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect."

⁸ *Shepherd v. Gilroy*, 46 Iowa, 196; *Mumford v. McPherson*, 1 John. 414; *Dickson v. Zizinia*, 10 C. B. 602; *Wilson v. Marsh*, 1 John. 503; *Carson v. Baillie*, 19 Pa. St. 375; *Smith v. Cozart*, 2 Head, 526; *Parkinson v. Lee*, 2 East, 314; *Willard v. Stevens*, 24 N. H. 371; *Brown v. Smith*, 5 How. (Miss.) 387; *Deming v. Foster*, 42 N. H. 165.

⁹ *Reed v. Wood*, 9 Vt. 285; *Smith v. Cozart*, 2 Head, 526; *Bond v. Clark*, 35 Vt. 577. See *Pickard v. McCormick*, 11 Mich. 68.

¹⁰ *Miller v. Van Tassel*, 24 Cal. 458.

and acted upon as such, will be enough.¹ A general warranty of soundness will only cover defects which are not visible and obvious as such, unless expressly made to do so, or they are fraudulently concealed.² A general warranty does not cover defects which are perfectly visible and obvious to the senses, and actually known to the party taking the warranty.³

Where, however, it was conceded that the defect complained of in a horse sold with warranty, so far as it was obvious and visible, was known to the purchaser or his agent, but it appeared that the seller represented that it did not injure the horse, nor affect him in the slightest degree; and the purchaser or his agent did not believe, and had no reason to believe, that the defect was anything but a mere blemish, which would never render the horse less useful or capable of service; and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of sale; it was held that this was one of those equivocal defects that a warranty may well be considered as taken to guard against.⁴

¹ Robinson v. Harvey, 82 Ill. 58; Swett v. Colgate, 20 John. 196; Chapman v. Murch, 19 id. 290; Carley v. Wilkins, 6 Barb. 557; Warren v. Van Pelt, 4 E. D. Smith, 202; Rogers v. Ackerman, 22 Barb. 134; Lawton v. Keil, 61 id. 558; Hawkins v. Pemberton, 51 N. Y. 198; White v. Miller, 71 id. 118; Stroud v. Pierce, 6 Allen, 413; Stone v. Denny, 4 Met. 151; Morrill v. Wallace, 9 N. H. 111; Henshaw v. Robins, 9 Met. 83; Hillman v. Wilcox, 30 Me. 170; Bryant v. Crosby, 40 id. 18; Randall v. Thornton, 43 id. 226; Walcott v. Mount, 36 N. J. L. 262; Taylor v. Bullen, 5 Ex. 779; Shepherd v. Kain, 5 B. & Ald. 240; Freeman v. Baker, 5 B. & Ad. 797; Power v. Barham, 4 A. & E. 473; Hopkins v. Tanqueray, 15 C. B. 130; Powell v. Horton, 2 Bing. N. C. 668; Allan v. Lake, 18 Q. B. 530; Hawkins v. Berry, 10 Ill. 36; Towell v. Gatewood, 3 id. 22; Ender v. Scott, 11 Ill. 35; Bond v. Clark, 35 Vt. 577;

Beals v. Olmstead, 24 Vt. 114; House v. Fort, 4 Blackf. 296; Humphries v. Comline, 8 id. 507; Hahn v. Doolittle, 18 Wis. 196; McGregor v. Penn, 9 Yerg. 74; Henson v. King, 3 Jones' L. 419; Ricks v. Dellahanty, 8 Port. 133; Murphy v. Gay, 37 Mo. 535; Carter v. Black, 46 id. 384; O'Neal v. Bacon, 1 Houst. 215; Osgood v. Lewis, 2 H. & G. 495; Otts v. Alderson, 10 S. & M. 476; Blythe v. Speake, 23 Tex. 429; Weimer v. Clement, 37 Pa. St. 147; McFarland v. Newman, 9 Watts, 55.

² Vanderwalker v. Ormer, 65 Barb. 556; Brown v. Bigelow, 10 Allen, 262; Chadsey v. Green, 24 Conn. 562; Dillard v. Moore, 7 Ark. 466; Fisher v. Pollard, 2 Head, 314; Mulvany v. Rosenberger, 18 Pa. St. 203; Dana v. Boyd, 2 J. J. Marsh. 587; Hudgins v. Perry, 7 Ired. 105; Pinney v. Andrews, 41 Vt. 631; Benj. on Sales, § 616.

³ Hill v. North, 34 Vt. 604.

⁴ Id.

The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them; but all other defects, though apparent to some extent, but still equivocal and doubtful in their character, as to whether they are permanent or temporary, or mere harmless blemishes, or but partially developed unsoundness, must be understood to be included in and covered by a general warranty.¹

For mere breach of warranty, the sale cannot be rescinded by return of the property, after it has been delivered and accepted so as to vest the property in the purchaser, unless the contract of sale gives that option, or requires it.² But in some of the states a warranty is considered in the nature of a condition subsequent at the election of the vendee; and upon a breach of it, he may rescind the contract by returning the property.³ If, by the terms of the contract, the purchaser is required absolutely to return the property if found defective or in any wise not conformable to the warranty, with a view to the substitution of other property, or rescission, then the vendee will have

¹Hill v. North, 34 Vt. 604. See Calloway v. Quattlebaum, 19 Ga. 277.

²Street v. Blay, 2 B. & Ad. 256; Gompertz v. Denton, 1 Cr. & M. 207; Poulton v. Lattimore, 9 B. & C. 259; Parsons v. Sexton, 4 C. B. 899; Dawson v. Collis, 10 C. B. 530; Cutter v. Powell, 2 Smith Lead. Cas. 26; Wright v. Davenport, 44 Tex. 164; Thornton v. Wynn, 12 Wheat. 183; Withers v. Green, 9 How. U. S. 213; Lyon v. Bertram, 20 id. 149; Voorhees v. Earl, 2 Hill. 288; Cary v. Gruman, 4 id. 625; Muller v. Eno, 14 N. Y. 601, per Comstock, J.; Kase v. John, 10 Watts, 109; Lightburn v. Cooper, 1 Dana, 273; Allen v. Anderson, 3 Humph. 581; Williams v. Hart, 2 id. 68; West v. Cutting,

19 Vt. 536; Hoadly v. House, 32 id. 179; Mayor v. Dwinell, 29 id. 298; Matteson v. Holt, 45 id. 336; Day v. Pool, 52 N. Y. 416; Rust v. Eckles, 41 id. 488; Milton v. Rowland, 11 Ala. 732; Scranton v. Mechanics' Trading Co. 37 Cal. 130; Freeman v. Clute, 3 Barb. 424.

³Dorr v. Fisher, 1 Cush. 271; Perley v. Balch, 23 Pick. 283; Conner v. Henderson, 15 Mass. 319; Kimball v. Cunningham, 4 Mass. 502; Bryant v. Isburgh, 13 Gray, 607; Hyatt v. Boyle, 5 Gill & J. 110; Taymon v. Mitchell, 1 Md. Ch. 496; Franklin v. Long, 7 Gill & John. 407; Rutter v. Blake, 2 Harr. & John. 353; Boothby v. Scales, 27 Wis. 626; Wardle v. Whitney, 23 Wis. 55; Merrill v. Nightingale, 39 Wis. 247.

no right of action on the warranty without returning or offering to return the property.¹

It is nowhere obligatory to return the goods, unless it is required by the contract. The buyer of goods may sue immediately on the breach of warranty; his action accrues at once on the completion of the sale, if the goods are not according to the warranty.² This is so, notwithstanding any difficulty or inability of the purchaser then to ascertain the quality or condition of the property.³ The measure of damages for breach of the warranty of title, it might be expected, would be, at least, what would be recoverable for failure to deliver; that is, the value of the property lost by the defect of title.

A loss of the property through a want of title is precisely the same to the vendee as a loss of it because the vendor fails to deliver, and the vendor is equally the cause of the loss in either case, by violating his contract. The value of the property at the time the vendee is dispossessed has been held to be the measure of damages.⁴ Generally, however, the measure has been stated to be the purchase money and interest;⁵ thus adopting the same rule that is applied generally in estimating the damages for breach of covenants for title to real estate.⁶ There can be no

¹*Sessions v. Hartsook*, 23 Ark. 519; *Mayor v. Dwinell*, 29 Vt. 298. Under a warranty that a horse is sound and kind, and if he should not suit, the seller would take him back, and send the purchaser another; *held*, that the warranty as to unsoundness was independent, and that the right to provide another horse under the contract did not extend to unsoundness; that the horse being unsound, and having died, the purchaser could recover damages, and was not obliged to call upon the seller to furnish another horse. *Perrine v. Serrell*, 30 N. J. L. 454.

²*Vincent v. Leland*, 100 Mass. 432.

³*Allen v. Todd*, 6 Lans. 222.

⁴*Grose v. Hennessey*, 13 Allen, 389; *Marlott v. Clary*, 20 Ark. 251;

Dabovich v. Emeric, 12 Cal. 171; *Boyd v. Whitfield*, 19 Ark. 447. This is assumed to be the measure in *Burt v. Dewey*, 40 N. Y. 283.

⁵*Ellis v. Gosney*, 7 J. J. Marsh. 109; *Crittenden v. Posey*, 1 Head, 311; *Anding v. Perkins*, 29 Tex. 348; *Noel v. Wheatley*, 30 Miss. 181; *Armstrong v. Percy*, 5 Wend. 535; *Burt v. Dewey*, 31 Barb. 540; *Goss v. Dy-sant*, 31 Tex. 186; *Grawberry v. Hawpe*, 30 id. 409; *Ware v. Weath-nall*, 2 McCord, 413; *Rowland v. Shelton*, 25 Ala. 217; *Shattuck v. Green*, 104 Mass. 42; *Eaton v. Mil-lus*, 7 Gray, 566; *Arthur v. Moss*, 1 Oreg. 193; *Atkins v. Hosley*, 3 Thomp. & C. 322; *Woods v. Woods*, 1 Met. (Ky.) 512.

⁶In *Crittenden v. Posey*, 1 Head, 311, the vendor had a life estate in

recovery on warranty for more than nominal damages, unless the paramount title has been asserted or yielded to, and the property given up to the owner.¹ A recovery of the value by the owner against the vendee is equivalent to an eviction for the purpose of recovery against the vendor on the warranty of title.²

Where the vendee is dispossessed by suit, and has, in good faith, incurred expenses in defending it, he is entitled to recover these also from the vendor as an additional item of damages, for the same reasons, and on the same conditions, as when an action is brought on the covenant of warranty in a deed of land, and in other instances of recovery over.³

the property, which was slaves, for the life of another, and in that case the consideration was permitted to be recovered back, but with an abatement of interest during the period of enjoyment; it was computed only from the termination of the life estate.

¹Wanser v. Messler, 29 N. J. L. 256; Bordewell v. Colie, 45 N. Y. 494; S. C. 1 Lans. 141; Joslin v. Caughlin, 27 Miss. 852; Sumner v. Gray, 4 Ark. 467; Sweetman v. Prince, 62 Barb. 256; Randon v. Tobey, 11 How. 493; McGriffin v. Baird, 62 N. Y. 329; Burt v. Dewey, 40 id. 283; Brown v. Smith, 5 How. (Miss.) 387; Patrick v. Swinney, 5 Bush. 421; Ogbum v. Ogbum, 1 Port. 126; Conner v. Eddy, 25 Mo. 72; Case v. Hall, 24 Wend. 102; Richardson v. McFadden, 13 Tex. 278; Dent v. McGrath, 3 Bush. 174; Schuchardt v. Allens, 1 Wall. 359. See Grose v. Hennessey, 13 Allen, 389.

²Bordewell v. Colie, 1 Lans. 141; 45 N. Y. 494; Allen v. Roundtree, 1 Spears, 76; Hynson v. Dunn, 5 Ark. 395; Sumner v. Gray, 4 Ark. 467.

³Thurston v. Spratt, 52 Me. 202; Armstrong v. Percy, 5 Wend. 535; Boyd v. Whitfield, 19 Ark. 477. In this case, the vendor lived in Vir-

ginia, and, after his death, his administrators also. The securities for the purchase money were in the hands of an attorney in Kansas for collection. He had been attorney for the vendor, and, after his death, was attorney for the administrator for the purpose of such collection. This attorney was notified of the suit, and the nature of it, for the assertion of the paramount title, and requested to attend to it in behalf of the vendor. The attorney, being unwell and unable to attend court, said he would request his partner to do so, and he did assist in the defense. Testimony was taken in Virginia, and it was inferred by the court that the vendor's administrator, in that manner, obtained notice of the suit, and the object of it, as he was present at the taking of the depositions, and the record was held conclusive against him. The property was slaves, and in the action upon the warranty the court gave the plaintiff their value, and the amount of hire he had been adjudged to pay the true owner, with interest, "etc.," which, perhaps, refers to the costs and expenses of defending the title.

By giving the vendor seasonable notice to defend the suit brought by the owner for the property, he is so far made a party, that, whether he responds to the notice and defends or not, the judgment is conclusive against him in favor of his vendee to the extent to which his rights are tried and adjudicated.¹

¹ *Davis v. Wilborne*, 1 Hill (S. C.), 27; *Pickett v. Ford*, 4 How. (Miss.) 246; *Barney v. Dewey*, 13 John. 225; *Blasdale v. Babcock*, 1 id. 517; *Brewster v. Countryman*, 12 Wend. 450; *Minor v. Clark*, 15 id. 427; *Middleton v. Thompson*, 1 Spear, 67; *Train v. Gold*, 5 Pick. 380; *Ives v. Niles*, 5 Watts, 325; *Collingwood v. Irwin*, 3 Watts, 310; *Eldridge v. Wadleigh*, 12 Me. 371. *Marlatt v. Clary*, 20 Ark. 251; *Meyers v. Smith*, 27 Md. 91. This was so held in *Armstrong v. Percy*, 5 Wend. 535. In August, 1825, the defendant had sold a horse to the plaintiff for \$140. In March, 1827, the plaintiff sold the horse, together with another, to Milligan, and took his notes for \$225. In May following, the horse bought of defendant was taken from Milligan by Gordon by replevin. A claim for property was interposed—the plaintiff and defendant in this action attended on the inquiry before the sheriff,—the jury found the property to be in Gordon, and defendant expressed his satisfaction with the finding. The replevin was prosecuted to judgment. Gordon recovered \$72.32 for damages, and \$33.95 costs, which sums, together with \$19.50, the costs of the defense, were paid by Milligan. *Armstrong* settled with Milligan by giving up his notes for \$225 and paying him \$20 in cash, and claimed of the referees a report in his favor for the amount of the original consideration paid Percy, and for the damages and costs recovered against and paid

by Milligan, which he had subsequently paid to Milligan in the manner above stated. Referees report \$275. *Marcy, J.*: “Where the action is on the warranty of title, the damages which naturally result to the purchaser are the value of the article which he loses by the failure of the title, or the price he has paid for it. In the cases of *Curtis v. Hannay*, 3 Esp. 82, and *Caswell v. Coan*, 1 Taunt. 566, no special damages were set forth in the declaration; the measure of damages, therefore, in those cases was the price paid for the article; but, in the case of *Lewis v. Peake*, 7 Taunt. 152, the declaration assigned as special damages, occasioned by the breach of the warranty, that the plaintiff, confiding in the defendant’s warranty, resold the horse, with warranty, and was thereby subjected to pay £88, as costs, besides the price of the horse. Having given notice to the defendant that he was prosecuted on his warranty, and offered him the option to defend (which was not accepted), the plaintiff was allowed to recover, in addition to the price of the horse, the costs which he was subjected to pay. The principle of that case is probably correct; but it may well be doubted whether the plaintiff here has brought himself within it. We are not furnished with the declaration, and may, therefore, presume that it is so framed as to allow the plaintiff to recover such special damages as, by law, he could, in

The vendor is bound to protect the vendee from all actions arising from circumstances anterior to the sale of which the cause existed or the germ, at the time of the sale; the debts chargeable on the thing sold, revenue duties to which the goods are liable, or such defects in the vendor's title as form a *labes realis*. Thus, if rent be due at the time of the sale, the vendor is liable on his implied warranty of title, if the property sold be afterwards lawfully seized and taken by the landlord to pay such rent.¹ This warranty extends to and protects against a prior lien as well as an adverse title. So where one sold property, and took a note for the price; the purchaser, finding a lien upon

any form of declaring, be entitled to recover. If the plaintiff was liable for the costs incurred in testing the title to the horse, or could have been made liable, and has, in fact, paid them, he may recover them of the defendant. If he has paid them without being under a legal liability to do so, it appears to me he had no just right to have them allowed to him in this cause. The extent of the plaintiff's right to damages could not be conclusively settled by the sum which he agreed to allow, or had actually paid Milligan, but by the amount that Milligan could have recovered against him. What sum could Milligan have recovered? Certainly not more than the price paid for the horse when purchased of the plaintiff, and the costs of the suit in which the title was tested. The fact that \$72.32 were allowed to the owners for damages proves that the horse had become deteriorated in the hands of Milligan; and, if so, he could not have recovered of the plaintiff the damages and costs which the owners recovered against him, and the full value of the horse, before the deterioration, or at the time of his purchase. The damages must be allowed in part or wholly for the use of the horse; and

as the plaintiff or Milligan must have had the benefit of that use, the defendant could not be legally charged therewith. The referees should have arrived at the amount which the plaintiff was entitled to recover, by allowing him the price paid to the defendant for the horse, and interest thereon, together with the costs which he became liable to pay to the true owners in their suit to establish their title. . . . I presume that the referees considered the costs paid by Milligan to his own attorney as an item to be taken into the calculation, but I know of no authority for doing so. In the case of *Lewis v. Peake*, the plaintiff was permitted to include, as an item in the amount of damages, the costs recovered against him on his warranty at the resale of the horse. In the case of *Blasdale v. Babcock*, 1 John. 517, which was an action on an implied warranty as to the title of a horse, the amount that had been recovered against the plaintiff by the owner of the horse was allowed to be the measure of his damages against the defendant. The expenses of Blasdale in defending the suit against him were not allowed to him as damages against Babcock."

¹ *Myers v. Smith*, 37 Md. 91.

the property at the time of the sale, paid it, it was held that the law presumed the payment to have been made at the request of the vendor, and that such payment was valid.¹ Where the adverse owner has recovered the value of the property instead of the property itself, and the vendor has had the requisite notice to defend the suit in which such recovery was had, he is liable to his vendee for the amount of that judgment, both as to damages and costs.

The general rule of damages for breach of warranty of any other kind is the difference between the actual value of the property at the time of the sale, and what its value would have been had it been as warranted to be.² And this rule is not affected by the fact that the vendee has sold the property at an increased price.³

The price paid for an article is in many jurisdictions deemed the best evidence of the value between the parties at the time of the purchase, and is preferred to any other evidence;⁴ but in

¹ *Crowell v. Simpson*, 7 Jones' L. 285; *Dresser v. Ainsworth*, 9 Barb. 619.

² *Houghton v. Carpenter*, 40 Vt. 588; *Perrine v. Serrell*, 30 N. J. L. 454; *Roberts v. Fleming*, 31 Ala. 683; *Buford v. Gould*, 35 Ala. 265; *Rutan v. Ludlam*, 29 N. J. L. 398; *Allen v. Anderson*, 3 Humph. 581; *Scranton v. Mechanics' T. Co.* 37 Conn. 130; *Richardson v. Mason*, 53 Barb. 601; *Tuckwell v. Lambert*, 5 Cush. 23; *Wells v. Selwood*, 61 Barb. 238; *Comstock v. Hutchinson*, 10 Barb. 211; *Voorhees v. Earl*, 2 Hill, 288; *Pritchard v. Fox*, 4 Jones' L. 140; *Clark v. Neufville*, 46 Ga. 261; *Morse v. Hutchins*, 102 Mass. 439; *Foster v. Rodgers*, 27 Ala. 602; *Cary v. Gruman*, 4 Hill, 625; *Tuttle v. Brown*, 4 Gray. 457; *Reggio v. Braggiotti*, 7 Cush. 166; *Van Valkenburgh v. Evertson*, 13 Wend. 76; *Decker v. Myers*, 31 How. Pr. 372; *Marshall v. Wood*, 16 Ala. 806; *Marshall v. Gantt*, 15 id. 682; *Scranton v. Tilley*, 16 Tex. 183; *Anderson v. Duffield*, 8 Tex.

237; *Williamson v. Conday*, 3 Ired. L. 349; *Siebels v. Blackwell*, 1 McMull. 56; *Badget v. Broughton*, 1 Ga. 591; *Sharon v. Mosher*, 17 Barb. 518; *Prentice v. Dike*, 6 Duer, 220; *Connor v. Dempsey*, 49 N. Y. 665; *Hook v. Stovall*, 30 Ga. 418; *Lane v. Lantz*, 27 Md. 211; *Hoe v. Sanborn*, 35 How. Pr. 197; *Anding v. Perkins*, 29 Tex. 348; *Williamson v. Dillon*, 1 Harr. & G. 444; *Thornton v. Thompson*, 4 Gratt. 121; *Burton v. Young*, 5 Harr. (Del.) 233; *Brown v. Sayles*, 27 Vt. 227; *Smith v. Cozart*, 2 Head, 526; *Converse v. Burrows*, 2 Minn. 229; *Roberts v. Carter*, 28 Barb. 463; *Whitmore v. South Boston Iron Co.* 2 Allen, 52; *Edwards v. Collson*, 5 Lans. 324.

³ *Brown v. Bigelow*, 10 Allen, 242; *Texada v. Camp*, Walk. (Miss.) 150.

⁴ *Clark v. Neufville*, 46 Ga. 261; *Marshall v. Wood*, 16 Ala. 806; *Scranton v. Tilley*, 16 Tex. 183; *Badget v. Broughton*, 1 Ga. 591; *Hook v. Stovall*, 30 Ga. 418; *Thornton v. Thompson*, 4 Gratt. 121; *Stout*

others is not treated as exclusive or the test of value;—only as admissible evidence tending to show value.¹

The rule of damages just stated, like all general rules, is intended for ordinary cases of the class to which it applies, and where it will afford to the injured party full compensation for the actual loss he sustains. It often happens, however, that the delivery and acceptance of property which is not conformable to the contract, imposes upon the vendee trouble and expense, which add to the loss compensated by that rule; and if it were applied arbitrarily, excluding all other items, it would in many instances fail to give adequate redress. As the paramount principle is to give compensation commensurate with the loss or injury, the rule on the subject of warranties is always stated

v. Jackson, 2 Rand. 132; Threlkeld v. Fitzhugh, 2 Leigh, 451.

¹Houghton v. Carpenter, 40 Vt. 588; Cary v. Gruman, 4 Hill, 625; Lane v. Lantz, 27 Md. 211; Gilpin v. Consequa, 3 Wash. C. C. 184; Anding v. Perkins, 39 Tex. 348. In Reggio v. Braggiotti, 7 Cush. 166, Shaw, C. J., said: "*Prima facie*, the price first paid for the article is good evidence of its value in one sense. But the value is not the same to both parties; and no merchant would make a purchase unless the goods bought were worth more to him than the amount he pays for them. In this country the established rule in relation to damages in such actions is that the plaintiff may recover what he can show that he has actually lost. A subsequent sale by the vendee of the article warranted is evidence of its value to him." In Morse v. Hutchins, 102 Mass. 440, the court say: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it, would be to make any advantage lawfully secured to the innocent purchaser in the original bargain enure to the benefit of the

wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken his contract at the expense of the party who was ready to abide by the terms of the contract."

In Rutan v. Ludlam, 29 N. J. L. 398, R sold to L a horse, for which L conveyed to him a house and lot and gave him a note for \$25. In an action against R for a false warranty of the horse, it was held that evidence of the value of the house and lot was inadmissible; that the only question was the difference in value between a sound horse and an unsound one.

In Comstock v. Hutchinson, 10 Barb. 211, a charge to a jury that the measure of damages was the difference between the price paid for the horse and the amount he realized on a resale was held erroneous; and the same in Cary v. Gruman, 4 Hill, 625. See Foster v. Rodgers, 27 Ala. 602; Tuttle v. Brown, 4 Gray, 457. In an action by the vendor for the price of goods (cigars), the defendant sought to recoup for damages done to the property after the sale and before delivery; it was held to devolve on him

when the case requires it, so as to include interest when the price has been paid, and any expense or other special damages naturally and proximately resulting from the breach.¹ Thus, where an article was sold as opium, the court held there was an implied warranty of genuineness; and there being a breach of this warranty, and the vendee having resold with a like warranty, and judgment recovered against him for breach of it, it was held that the sum paid on this judgment was *prima facie* the amount he was entitled to recover against his vendor; also, that if he gave his vendor notice of the commencement of that suit, and requested him to defend it, the plaintiff might, likewise, recover his taxable costs incurred therein; but following the Massachusetts rule, the attorney fees paid for the defense of such suit were not allowed.²

In an action for the breach of warranty on the sale of a mare, the representation proved to have been made to the plaintiff was, that the mare was perfectly gentle and kind, and it was false. The action was for this false and fraudulent representation, and it appeared that, within two days after the sale and purchase, the plaintiff attempted to drive the mare before a buggy, when she commenced running and kicking, and the buggy was broken; the plaintiff to save himself sprang to the ground and thereby broke one of his legs; it was held admissible to prove

to prove that the injury was done during such period. And that he must prove the actual damage without reference to the price paid at auction; that it was erroneous to allow him the difference in value between the price at which he bought them at auction and the value when delivered. *Gerard v. Prouty*, 34 Barb. 454.

¹ *Roberts v. Fleming*, 31 Ala. 683; *Buford v. Gould*, 35 id. 265; *Perrine v. Serrell*, 30 N. J. L. 454; *McKay v. Lane*, 5 Fla. 268; *Foster v. Rodgers*, 27 Ala. 602; *Reggio v. Braggiotti*, 7 Cush. 166; *Marshall v. Wood*, 16 Ala. 806; *Badget v. Broughton*, 1 Ga. 591; *Sharon v. Mosher*, 17 Barb. 518; *Prentice v. Dike*, 6 Duer, 220;

Seibles v. Blackwell, 1 McMull. 56. In *Clark v. Neufville*, 46 Ga. 264, in an action for breach of warranty of quality in a sale of goods, the court say the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule excluding indirect and speculative damages. *Thompson v. Bertrand*, 23 Ark. 730; *Tatum v. Mohr*, 21 id. 349; *Murray v. Meredith*, 25 id. 164.

² *Reggio v. Braggiotti*, 7 Cush. 166; *Randall v. Roper*, E. B. & E. 84; 27 Law J. B. R. 266.

the nature and extent of the injury to his leg; the length of time he was confined to his house; the permanent character of the injury to his limb; and the damage done to his buggy; that it should be left to the jury to say, as a question of fact, whether such injuries resulted from the viciousness of the mare, and were probable and natural consequences of the fraud practiced upon the plaintiff by the defendant.¹ Where slaves were purchased as sound, and proved to be unsound or diseased, reasonable charges for care and attention, and medical aid,² were to be allowed as damages. And the same rule applies to other property.³ In such cases the vendee must exert himself with diligence and good faith to effect a cure, and thus prevent further damage.⁴

Where a contract is made by one to furnish to another a specific article of a particular description, to be used for a particular purpose; or for use at another place; and the destination, purpose and use are known to him who agrees to furnish the article; and the article furnished is defective for the purpose, and not according to the contract; the damages occasioned by reason of such defects, with reference to such purpose and place, are direct and recoverable. The measure, in such case, is the difference between the value of the article received, and that of the article contracted for, at the place and for the purpose contemplated.⁵

¹ Sharon v. Mosher, 17 Barb. 518.

² Roberts v. Fleming, 31 Ala. 688; Marshall v. Wood, 16 Ala. 806; Kornegay v. White, 10 id. 255; Willis v. Dudley, id. 933; Stondenmier v. Williamson, 29 id. 558; Worthy v. Patterson, 20 id. 172; Gengles v. Caldwell, 21 id. 441; Buford v. Gould, 35 id. 265; Hogan v. Thornton, 8 Port. 428.

³ Penny v. Andrus, 41 Vt. 631.

⁴ Id.

⁵ Converse v. Burrows, 2 Minn. 229. In this case the trial court gave an instruction to the jury embodying a legal proposition substantially as stated in the text, which on appeal was approved. The case is

not a novel one, but the principle discussed in the opinion is of great practical importance, and will justify a full quotation. Atwater, J., said: "Had there been nothing said between the parties to this contract as to the place where the pork contracted for was to be used, there seems to be no dispute but that the correct rule of damages would have been the difference in the value of the article contracted for and that of the article received at the place of delivery; but the case at bar forms an exception to this general rule. The plaintiff designed this pork for a particular place and purpose, of which fact he notified the

The cases reported show a great variety of illustrations of the rule that the damages are the difference between the actual value of the property, and what its value would have been if

defendants at the time of the contract. The defendants therefore entered into the contract in view of these facts, and incurred the obligations imposed by the law in such cases. What were these obligations? In our view, to pay the difference between the value of the pork, as such value was actually found in its damaged state at Fort Ridgeley, and the market value of the quality of pork contracted for at the same place. The correct rule of damages in this case must be determined from the language adopted in the complaint, which purports to state the substance of the contract in reference to the place of destination and use of the pork. The only clause in the complaint referring to this point reads as follows: 'The said plaintiff further shows to the court that the said pork was to be furnished to the plaintiff for supplies for Fort Ridgeley, in the territory of Minnesota, which plaintiff had contracted to supply, which fact was well known to said defendants.' Now had the complaint simply stated that the pork was destined for use at Fort Ridgeley, or for the market at Fort Ridgeley, and that the defendant had notice thereof, we presume there would have been little question but that the instruction of the court to the jury would have been correct. The case would have fallen within the rule laid down in *Bridge v. Wain*, 1 Stark. 504, a case which seems to be quoted with approbation in *Cary v. Gruman*, 4 Hill, 625, as well as in *Hargous v. Ablon*, 5 Hill, 472. The general rule of damages for breach of warranty on a sale of personal

property, as above stated, is the difference between the article sold, in its defective condition, and the market value of the article at the place where it was to be used, in the condition represented by the vendor. The reason of this rule does not seem to be based upon the fact that such measure of damages would always restore the vendee to what he had lost by the breach of warranty, for in many cases this would not be true; but rather upon grounds of public policy, it being manifestly more for the public interest, that some rule should be established in such cases, rather than leave each individual case to be governed by its own particular circumstances. Hence, parties entering into contracts of this kind are aware of their rights and liability under a breach of contract by either party; and the exception to the rule in the case above referred to is founded on the same reason and is in harmony with it, the only difference being that the rule of damages being made to depend on the market value of the article at the place where it is to be used, rather than the value at the place where it is purchased; and no good reason can be offered why the rule should be otherwise. If the general rule be not based upon the principle of restoring the party to what he has lost by the breach of contract, it is difficult to perceive why the exception should be based upon such principle. For the parties sustain the same relation to each other, and the subject matter, save that in the latter case the article is purchased for a particular

conformable to the warranty. The special value to the vendee for a particular use will be taken into account, if known to the vendor at the time of the sale, and he expressly or by implica-

market, of which the vendor is apprised, and it is manifest justice that the vendee should be made whole in that market. And in the eye of the law he is made whole by receiving the difference between the actual value of the article in its damaged condition, and its real value in the condition required by the contract at the place where the article was to be used. But it is claimed that the allegations of the complaint extend the contract made between the parties, so that in case of a breach on the part of the defendants they became liable for the difference, not between the market value of such pork at Fort Ridgeley, as was called for by the contract, and the inferior article furnished by them, but for the difference in value between such article and the contract price between the plaintiff and the Fort.

"Let us look at the allegation, and see if this view can be sustained. It will be observed that it does not appear from the pleadings what the contract was between the plaintiff and the party with whom he contracted at Fort Ridgeley; nor that there was any stipulated price for the pork. Much less does it appear that the plaintiff, at the time he contracted with the defendants for the purchase of the pork, informed them that he had contracted with the Fort at any particular price, nor, if so, at what price. In the absence of any agreement, therefore, on the subject, the presumption would be that the plaintiff had agreed to furnish the pork at current rates at the place of delivery (the Fort). But whatever his agreement may have

been, it does not appear that the defendants had any reference to it, or were influenced by it, in entering into their contract. They did not agree to fill the contract of the plaintiff, nor does it appear that they knew what his contract was. They knew only that he had a contract to fill at that place; and the fact that they were aware that the pork was to be used by the plaintiff at Fort Ridgeley makes the case an exception to the general rule which would govern damages on breach of warranty. And to bring the defendants within the exception, it was important that they should know in reference to the plaintiff's contract, so far as the place was concerned. For the degree of care and diligence which they might exercise to fill their contract might be influenced by such knowledge. The fact that the pork was to be transported to a considerable distance during the summer season, might lead them to exercise more care in its selection and preparation than they otherwise would have done. It, therefore, becomes important to the plaintiff, if he would bring the defendants within the exception to the general rule of damages, that he should bring home to them the knowledge that the pork was to be used at a certain place; and if he would go further than this, and make the defendants responsible for the loss he has sustained on the particular contract, he must at least show that the defendants knew that the contract was to fill his own, or to make him whole for any failure to do so. The object of the court should be to apply the rule of law to the contract

tion undertook to furnish goods suitable for that use. The principle seems to be now settled, that when the manufacturer of an article sells it for a particular purpose, the purchaser

between the parties, if that contract can be ascertained. We are satisfied that the defendants entered into the contract with the plaintiff with the knowledge of the place where the pork was to be used by the plaintiff. But we are not satisfied, nor is there anything in the case to show that the defendants, in making their contract, took into account in any manner the price the plaintiff was to receive for his pork; or that they ever even knew what price he was to receive. In such case, we certainly can see no good reason why either the defendants or plaintiff should now claim any benefit from a consideration which never entered into the original contract. Suppose the plaintiff had contracted to sell his pork at the Fort for one hundred dollars per barrel, should he be permitted to recover from the defendants the difference between that sum and the actual value of the pork per barrel at the Fort in its damaged condition? Manifestly, it would not be just that he should do so, unless the defendants had expressly agreed to pay such difference.

“A law which should recognize such a measure of damages in such cases, would be highly inequitable, and work great injustice. If such was the rule, as has been justly observed, it would open the door to unfair dealing, and a fraudulent inflation of price, by the vendee, with a view to charge the vendor or guarantor; for if the vendor was to be made liable for the loss of a particular trade, which the vendee might have made with reference to the subject matter of the sale, the particulars of such trade, especially

as to price, would be of the highest consequence to the vendor, and would form a principal element in, and become the very essence and basis of, the original transaction, instead of being considered of such little moment as not even to be mentioned between the parties. Had the contract between the plaintiff and the defendants in the case at bar been in fact made with reference to the price at which the plaintiff resold the pork, as well as the place where it was to be used, that fact should have been averred by the defendants in their answer, if they would avail themselves of any advantages from it.

“If the rule in this case be that the plaintiff is entitled to recover from the defendants such sum as he has lost by their breach of warranty, at the place where the pork was destined to be used, then the proposition must be true that the loss of a particular bargain, on resale of the warranted article, must be the rule of damages on breach of warranty: but the authorities are directly to the contrary of this proposition. In *Chase v. Maynard*, 7 C. & P. 741, it appears that the plaintiff gave \$45 for a horse, and had sold him for \$55, with warranty, but was obliged to take him back. This, *per se*, was not allowed as a ground for recovering the \$10 difference, the court saying it was the mere loss of an accidental bargain. The same principle is recognized in *Voorhees v. Earl*, 2 Hill, 388; *Clare v. Maynard*, 6 Ad. & E. 19; *Hargous v. Ablon*, 5 Hill, 472; *Phillips' Eq.* vol. 5, p. 105; *Greenlf. on Ev.* vol. 2, p. 273; *Sedg. on Dam.* 295.”

making known to him at the time the purpose for which he buys it, the seller impliedly warrants it fit and proper for such purpose and free from secret or latent defects.¹ In *Brown v. Sayles*² it was held that, when an article is to be manufactured to order, and nothing is said as to the quality of the material to be used, it is implied that it shall at least be of an ordinary quality. The acceptance of an article so manufactured is not binding and conclusive upon the purchaser, if the material was defective, but the defect not known nor observable on careful inspection. After such an acceptance of a defective article, the purchaser will only be liable for the value of the article, and not for the contract price.

Dealers who do not make or grow what they sell, may, by the circumstances of the sale, incur a like obligation. They must agree that what they sell is suitable for the intended use; and the purchaser must trust to the judgment and skill of the vendor.³ In such cases, and also where there is an express warranty, the value of the property purchased to the vendee includes those gains which would, with the requisite certainty, have accrued to him if the vendor had faithfully performed his contract, and exemption from those expenses and losses which naturally and proximately result from his failure to do so. Thus a warranty of a steam engine, as having a certain capacity for work, and as sound and in good order, if untrue, will entitle the vendee to recover the difference between the actual value

See *Bridge v. Wain*, 1 Stark. 504. In this case scarlet cuttings were purchased for sale in China. In an action for breach of the implied warranty that the goods were such, Lord Ellenborough instructed the jury to consider the effect of their being of no use or value in China. "I am decidedly of the opinion," said his lordship, "that by value, is to be understood the value which the plaintiff would have received had the defendant faithfully performed his contract."

As to the necessity that the vendor be informed of the price in the vendee's contract for resale, see

vol. I, p. 84. *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Elbinger Actien Gesellschaft v. Armstrong*, L. R. 9 C. P. 473; *Booth v. Spuyten Duyvil R. M. Co.* 60 N. Y. 487.

¹ *Pease v. Sabin*, 38 Vt. 432; *Edwards v. Collson*, 5 Lans. 324; *Charlotte, etc. Co. v. Jessup*, 44 How. Pr. 447; *Merrill v. Nightingale*, 29 Wis. 247; *Gaylord Manuf'g Co. v. Allen*, 53 N. Y. 515; *Walton v. Cody*, 1 Wis. 420.

² 27 Vt. 227.

³ *Charlotte, Columbia, etc. Co. v. Jessup*, 44 How. Pr. 447; *Mason v. Chappell*, 15 Gratt. 572.

and what its value would have been had the engine been conformable to the warranty.¹ And the vendee may show this difference of value by proof of what it would cost to replace the machinery furnished with such as was demanded by the contract.² A vendor of a rope, to be used on the vendee's crane, was held to import a warranty of fitness for that use, and he was held liable for a cask of wine lost by the breaking of the rope;³ and in another case for the value of an anchor lost by the breaking of the cable sold for the purpose of holding it.⁴

Where coal dust was sold and warranted to contain no soft or bituminous coal, and was sold with knowledge that it was intended by the vendee to make brick, and that if there was soft coal dust in it it would be unfit and ruin the brick, on breach of the warranty it was held that the vendee was not limited in his recovery to the difference between the value of impure and pure dust, but that he might recover all the loss he had actually sustained from the use of the dust in making brick; that such damages were clearly such as were in contemplation of the parties.⁵

On a sale of onion seed, it was warranted to be "good, fresh,

¹ *Edwards v. Collson*, 5 Lans. 324; *Ladd v. Lord*, 36 Vt. 194; *Merrill v. Nightingale*, 39 Wis. 247; *Giffert v. West*, 33 id. 617; *Park v. Morris Ax & T. Co.* 4 Lans. 103.

² *Holmes v. Boydsten*, 1 Neb. 346; *Hitchcock v. Hunt*, 28 Conn. 343; *Fisk v. Tank*, 12 Wis. 276; *Benjamin v. Hilliard*, 23 How. U. S. 149.

³ *Brown v. Egington*, 2 M. & G. 279.

⁴ *Borradaile v. Brunton*, 8 Taunt. 535. The authority of this case was questioned in *Hadley v. Baxendale*, 9 Ex. 341; S. C. 23 L. J. Ex. 180. This criticism is noticed in *Mayne on Dam.* (Wood's ed.) 267, and the remark of Alderson, B., that on the same principle the jury might have given the value of the ship, if it had been lost. This author says: "No doubt the enormity of the damages which would be

recoverable in such a case is very startling. But if a chain cable is sold for the express purpose of holding a ship to its anchor, and if, through some defect of it, the ship drifts on shore, it is difficult to see why the damages should stop at any smaller amount. When the pole of a carriage broke, in consequence of which the horses became frightened and were injured, the court held that the sale of the pole carried with it an implied warranty that it was reasonably fit for its purposes; and that, as to damages, the proper question to leave to the jury was, whether the injury to the horses was or was not a natural consequence of the defect in the pole. *Randall v. Newson*, L. R. 2 Q. B. D. 192; 46 L. J. Q. B. 259."

⁵ *Milburn v. Belloni*, 39 N. Y. 53; reversing S. C. 34 Barb. 607.

and such seed as would grow;" there being a breach of warranty, the seed not growing, the vendee was held to be entitled to recover, as damages, the amount paid for the seed, the value of labor in preparing the ground for the seed (after deducting the benefit to the land), and the value of the labor in planting the seed, with interest on the several amounts.¹ In another case, where the warranty was that the seed was "early strap-leaved, red-top, turnip seed," on a breach because the seed sold was a different turnip seed, it was held that the measure of damages was the difference between the market value of the crop raised, and one from the seed ordered.² Depue, J., said: "Profits expected to be made from a whaling voyage, the gains from which depend, in a great measure, upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract by reason of which the adventure was defeated. For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield of which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with that degree of certainty which the law exacts in the proof of damages. But, if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is that, because of the inferior quality of the seed, a crop of less value is produced, by these circumstances, the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character. In this case, the defendant had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent on the condition of the weather and season, was removed by the yield of the ground under the precise

¹ Ferris v. Comstock, 33 Conn. 513.

² Wolcott v. Mount, 6 N. J. L. 262.

circumstances to which the seed ordered would have been exposed." There is no inconsistency between the result here reached and that arrived at in the preceding case, but the language here quoted would exclude the damages allowed when the seed did not grow, when planted. In the foregoing quotation, the uncertainties of weather and season render the crop, when the seed is not sowed, incapable of estimation; but it is conceded to be otherwise if a different seed is sowed and a crop raised on the ground prepared for the seed ordered. It is to be observed that the contract of sale was not made with reference to the use of the seed on any specified ground. And hence the uncertainties of weather and season might be removed by proof of actual turnip raising in the vicinity, and the requisite proof would always exist if any turnips were produced in the neighborhood; such proof would entirely harmonize with the principle of the other illustrations of a vessel under charter or engaged in a trade. A similar case to the last arose in New York;¹ and the court held to the same rule of damages, and it has been approved in a still later case.² Andrews, J., referring to the preceding case, said: "It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principles. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach.³ But mere contingent and speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passenger v. Thornburn* are incapable of being ascertained with reasonable certainty by a jury? The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted

¹ *Passenger v. Thornburn*, 34 N. Y. 634.

² *White v. Miller*, 71 N. Y. 118.

³ *Masterton v. Mayor*, etc. 7 Hill,

61; *Griffin v. Colver*, 16 N. Y. 489;

Messmore v. N. Y. Shot and Lead

Co. 40 N. Y. 422.

under similar circumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these, and other circumstances, may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind. The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values.”¹

A few months prior to the decision of *White v. Miller*, the case of *Van Wyck v. Allen*² had been decided, but is not referred to in the later decision. The instruction given the jury in *Passenger v. Thornburn* was, that, if the warranty was untrue, then “the damages would be the value of the crop of Bristol cabbages such as they should believe would ordinarily have been produced that year, deducting all expense of raising the crop, and also deducting the product or value of the crop actually raised.” In *Van Wyck v. Allen*, the question was whether this instruction was sufficiently favorable to the plaintiff. Folger, J., said: “It is urged here as error, that the trial court departed from the rule in that case laid down, in not directing a deduction from the value of the crop of the costs of producing it; so that we are to assume for the purpose of this case, that the decision in *Passenger v. Thornburn* is not erroneous. But it will be observed of that case that it did not undertake to fix the limits of the rule on all sides. There came to this court therein, for review, a rule of damages laid down at the circuit, to wit: that the plaintiff was entitled to recover the value of a crop which could have been raised from good seed, less the cost of producing the crop, and the value of what was in fact raised. To this holding at the circuit, the defendant excepted, but the plaintiff did not; so that there was raised in this court only the question whether the rule was unjust to the defendant; not any question whether the plaintiff could have found fault with its limits. The appellate court could not re-

¹Citing *Mahon v. New York, etc.* Velie, 60 N. Y. 106; *Sedgw. on Dam.* R. R. Co. 20 N. Y. 469; *Smith v.* 377.

²69 N. Y. 61.

view it, save to say that it was or was not too large. Whether it might not have been larger, was not before the court, so that case is not an authority against the holding now before us. It is a decision which we may not in this case question, that where seeds are sold as, or warranted to be, those of a certain vegetable, and to produce that vegetable, then the vendee, the warranty failing, may recover the value of the reasonably anticipated crop, less the cost of tillage, and the value of what was in fact raised. But if he may recover the value of the crop which should be, why, when naught is the product, should the vendee be held to credit the vendor with the lost labor and expenses? That he has expended, in this case, and should be remunerated, if he is to have full compensation. He would have been repaid it out of the profits of the crop, had a crop been raised. He will repay it now out of the damages, which stand in the place of the profits of the crop, if his judgment for them remains unimpaired. If he, having paid it out in futile tillage, is not to have recompense for it, he has lost it once. And if now, he is to deduct it from the value of the crop which that tillage should have produced, he loses it twice. The crop, if raised, would have represented to him all that went into it, of time, labor, money, use of land and materials. The avails of the crop would have gone to reimburse each of those. He gets, in his damages, what the avails of the crop would have been, and those damages should go to reimburse each of those items. But if from the damages he deducts them, there are no damages to reimburse them, and he loses them entirely. If there had been any part of a crop raised, the value of that, clearly, should have been deducted.”¹

Where seeds are sold with a warranty that they are of a kind identified by a particular name, with notice that the purchaser intends to sell them again to buyers who will purchase for the purpose of sowing them, if the warranty is untrue, there seems to be no difference in principle as to the subject of damages between such a sale, and one with such warranty, where the purchaser is known to buy for the purpose of sowing them himself. The warranty to one buying seed to sell again,

¹See *Page v. Pavey*, 8 C. & P. 769; *Cary v. Gruman*, 4 Hill, 625.

justifies him in warranting it accordingly to his customers; and as they have recourse to him for damages estimated by the standard just mentioned, that is also the measure of his loss as against his vendor.¹

If animals sold are warranted sound, and are not so, but have an infectious or contagious disease which they communicate to others, where the parties contemplate their being placed with other stock, the loss not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them.² So the buyer may recover damages for personal injuries which result from selling property with a false warranty. A chemist or druggist may be held liable for such injuries received from deleterious compounds furnished which are unfit for the purpose for which he professed to sell them.³ A dealer will be liable for like injuries resulting from explosion of illuminating oils sold with warranty, express or implied, which is untrue.⁴ And so will any vendor be held answerable for such injuries from vicious animals, sold with warranty of gentle and docile nature.⁵ In such cases there is a negligence which, even in cases free from fraud, involves a serious breach of social duty, as well as contract; and when the injury comes to the vendee from an exposure induced by the warranty, doubtless the right to damages in an action upon the warranty would be co-extensive with that allowed for compensation in actions for negligence. Where an act of negligence is eminently dangerous to the lives of others, the guilty party is liable to one injured by the negligence, whether there be a contract between them violated by that negligence or not.⁶ If the

¹ *Randall v. Raper*, E. B. & E. 84; 27 L. J. Q. B. 266.

² *Pinney v. Andrews*, 41 Vt. 631; *Bradley v. Rea*, 14 Allen, 20; *Marsh v. Webber*, 16 Minn. 418; *Brown v. Wood*, 3 Cold. 182; *Faris v. Lewis*, 2 B. Mon. 375; *Rose v. Wallace*, 11 Ind. 112; *Sherrod v. Langdon*, 21 Iowa, 518; *Nintz v. Morrison*, 17 Tex. 372; *Jeffrey v. Bigelow*, 13 Wend. 518. See *Hill v. Ball*, 2 H. & N. 299;

27 L. J. Ex. 45; *Mullett v. Mason*, L. R. 1 C. P. 559.

³ *George v. Skirington*, L. R. 5 Ex. 1; 39 L. J. Ex. 8; *Thomas v. Winchester*, 6 N. Y. 397. See *Longmeid v. Halliday*, 6 E. L. & Eq. 562.

⁴ *Miller v. Downer, etc. Co.* 104 Mass. 64; *Davidson v. Nichols*, 11 Allen, 519.

⁵ *Sharon v. Mosher*, 17 Barb. 518.

⁶ *Longmeid v. Halliday*, supra.

law and a contract impose the same duty, the same redress for violation is due by either, and would be accorded, unless there should be practical restriction in the form of action necessarily resorted to to obtain that redress. In *McDonald v. Snelling*,¹ Foster, J., said: "Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he shall be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well established and ancient doctrine of the common law, and such liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote, if, according to the usual experience of mankind, the result was to be expected."²

¹ 14 Allen, 290.

² In *McGavoch v. Wood*, 1 Sneed, 181, a slave was sold to be taken south or elsewhere for sale or service; and after the journey an action was brought by the vendee against the vendor upon his warranty of soundness; held, there was no rule which would authorize the plaintiff to recover the expenses of the slave on that trip.

In *Gas Light Co. v. Colliday*, 25 Md. 1, it was held that for shutting off gas, and refusing to supply it according to contract, after the pipes and fixtures for that purpose had been put in place, in a building used for business purposes, the depreciation of the property for sale or lease, and the expense of restoring the premises to proper condition, divested of the gas pipes, might be taken into account as part of the damages.

In the similar case of *Shepard v. Milwaukee Gas Light Co.* 15 Wis.

318, which was like the common law action on the case, the jury was instructed that "plaintiff, if entitled to a verdict, should have such damages as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business, arising out of the defendant's refusal to furnish gas to him." Payne, J., delivering the opinion of the court, said: "It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But we think this is clearly not so. The 'inconvenience and annoyance' occasioned directly by the wrongful act, or refusal of the defendant, are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this, as a punishment for the other party. In actions for a nuisance, the damages usually consist almost entirely in inconvenience and annoy-

DEFENSE TO ACTIONS FOR PURCHASE MONEY.— The vendee cannot resist the collection of the purchase money, where there is no fraud or warranty, merely because the property is less valu-

ance. So also in many other actions of tort. In *Ives v. Humphrey*, 1 E. D. Smith, 201, the court says: 'Even if the plaintiff be confined strictly to compensation for the injury sustained by him, the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family.' And again: 'For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff; and in estimating the amount of such damages, all the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, or pain, or insult, or inconvenience.' So in an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the general allegation of damages, as going to show that 'the plaintiff had sustained inconvenience.' *Ward v. Smith*, 11 Price, 19. . . . But the appellant further objects to the admission of evidence to show that it would injure the plaintiff's business to be deprived of gas when other stores were lighted with it. It is said that the object of this was to show that the want of gas would tend to prevent customers from coming to the store, and consequently that the plaintiff lost the profits that he otherwise might have made. And the appellant then relies on a class of authorities in

which, both in actions of tort and for breaches of contract, it has been held that anticipated profits could not be recovered as damages. Upon this subject the authorities are full of confusion and uncertainty, and it is very generally conceded that no definite or satisfactory rule can be extracted from them. *Sedgwick on Dam.* p. 112; *Cincinnati v. Evans*, 5 Ohio St. 603. But I think it can by no means be said to be established, that the profits of a business or of a contract may never be considered in estimating the damages, where one party has been deprived of those profits by the wrong or default of another. On the contrary, I think the opposite conclusion is sustained, and that the tendency of the recent cases is to allow such profits to be recovered as damages, where their amount can be shown with reasonable certainty.

"The question often arises in cases of breach of contract, and there are many authorities which hold that the profits that might have accrued to the injured party on the contract itself, which was broken, may be recovered as damages. *Philadelphia, etc. R. R. Co. v. Howard*, 13 How. U. S. 307, 344; *Masterton v. Mayor, etc. of Brooklyn*, 7 Hill, 61; *Fox v. Harding*, 7 Cush. 522. These cases confine the profits to be recovered to such as might have been made on the contract, the breach of which is complained of.

"Yet it is very evident that even such profits cannot be arrived at with any absolute certainty, as they frequently depend upon fluctuations in the market, and changes in the price of labor and materials, which

able than he supposed;¹ nor because of latent defects.² But where goods are sold with warranty, which proves untrue, the vendee, when sued for the contract price, either on a general count for goods sold and delivered, or bargained and sold; upon the special contract of sale, or upon a note or other security for the price, may allege the breach of warranty as a defense, and may obtain an abatement of damages, to the amount he would be entitled to recover for such breach in a cross action. This defense is allowed under various names—reduction or mitigation of damages, partial failure of consideration, discount, or

may take place while the contract is being performed. Yet, inasmuch as they may be estimated with reasonable certainty, and their loss is the direct result of the wrong complained of, they are allowed to be recovered. And in the case of *Waters v. Towers*, 20 Eng. L. & Eq. 410, the rule was extended so as to include profits on a collateral contract which the plaintiff had entered into with other parties. The court said: "If reasonable evidence is given that the amount of profit would have been made as claimed, the damages may be asked accordingly. . . . *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398; *Fletcher v. Tayleur*, 33 Eng. L. & Eq. 187."

"I think the principle fairly to be derived from these cases is, that the profits lost as a direct result of a breach of contract may be recovered as damages, where they are not so conjectural and remote as to be incapable of ascertainment with reasonable certainty. And their reasoning seems entirely applicable to this case. The defendant here knew that if he refused gas to the plaintiff, he could get it nowhere else. It stood, therefore, in the same position that the carrier would have been in, in *Hadley v. Baxendale*, if he had known the plaintiff could have no shaft to his mill until

the model was delivered. The defendant, therefore, must be presumed to have contemplated whatever damage would naturally arise from its refusal to furnish the plaintiff with gas. Its obligation to furnish it was, according to the decisions of this court, as clear and imperative as though it had expressly contracted to do it. And it seems to me that the profits of an established business are quite as capable of being ascertained with reasonable certainty, as the profits to arise from a single contract or adventure. There is, in the case of such a business, the experience of the past to serve as a test. And the rule suggested by *Jarvis, C. J.*, in *Fletcher v. Tayleur*, that the damages should be estimated, 'according to the average percentage of mercantile profits,' could readily be applied, and would seem just and reasonable. The cases already referred to seem to me, therefore, applicable here, and to sustain the conclusion that the profits of a business, which are necessarily lost by the wrong or default of another, may, under some circumstances and with proper restrictions, be considered in estimating the damages for the injury."

¹ *Leonard v. Peebles*, 30 Ga. 61.

² *Drew v. Rae*, 41 Conn. 41.

recoupment. It is not universally allowed, but nearly so, not only for breach of warranty, but also for any fraud of the vendor in the sale. The cases cited below fully define and illustrate this defense; and for a full exposition of the subject, the reader is referred to the section on Recoupment and Counterclaim.¹

¹Vol. I, pp. 261, 278; McAllister v. Reab, 4 Wend. 484; Reab v. McAllister, 8 id. 109; Van Epps v. Harrison, 5 Hill, 63; Ward v. Reynolds, 32 Ala. 384; Hoe v. Sanborn, 3 Abb. N. S. 189; Caldwell v. Sawyer, 30 Ala. 283; Jemison v. Woodruff, 34 id. 143; Davis v. Dickey, 23 id. 848; Rotan v. Nichols, 22 Ark. 244; Desha v. Robinson, 17 id. 228; Plant v. Condit, 22 id. 454; Peck v. Farrington, 9 Wend. 44; Parker v. Pringle, 2 Strobh. 249; Young v. Plumeau, Harp. 349; Harmon v. Sanderson, 6

Sm. & M. 41; Wheelock v. Pacific P. G. Co. 51 Cal. 223; Polehemus v. Heiman, 45 Cal. 573; Huckaber v. Albritton, 10 Ala. 651; Simmons v. Cutreer, 12 Sm. & M. 584; Otis v. Alderson, 10 id. 476; Allaire v. Whitney, 1 Hill, 484; 1 N. Y. 305; Luffburrow v. Henderson, 30 Ga. 482; Perley v. Balch, 23 Pick. 282. See McDugald v. McFadgin, 6 Jones' L. 89; Henning v. Vonhook, 8 Hump. 678; McEntyre v. McEntyre, 12 Ired. 299.

CHAPTER V.

CONTRACTS FOR SERVICES.

On a hiring for fixed wages—On a quantum meruit—A statutory day's work—Proof of the value of services—Recovery of attorney's services—For brokers—Various modes of compensating services—Presumption of same terms where employé continues work—Necessity of full performance of entire contract—Dispensation in case of inability—Entire and apportionable contracts—For wrongful dismissal.

This subject properly includes the contracts not only of the mere servant and laborer, those of mechanics and builders, those for professional and skilled labor, but also salvage service, agency, and many kinds of bailment.

ON A HIRING FOR FIXED WAGES.—Where the contract is express and fixes the amount of compensation, on performance, that stipulated compensation is the measure of damages, whether the action is brought on the contract or is general assumpsit.¹

ON QUANTUM MERUIT.—If the compensation has not been fixed by the agreement of the parties, then the party who has done work, on a hiring for wages, may recover so much as the services are reasonably worth, or so much as he deserves.² Recovery may be had according to the value of the services, not the benefit the employer derives therefrom.³ A contract to pay for services may be inferred from circumstances, without any express agreement;⁴ and the price may be tacitly fixed by

¹ Fells v. Vestvali, 2 Keyes, 152; McKenney v. School District, 20 Minn. 72; Edwards v. Goldsmith, 16 Pa. St. 43; Dermott v. Jones, 2 Wall. 1; Chesapeake & O. Canal v. Knapp, 9 Pet. 541; Perkins v. Hart, 11 Wheat. 237. See Gay v. Batts, 13 Bush, 299; Sprague v. Morgan, 7 Ala. 952; Evans v. Bennett, 7 Wis. 404; State v. Hawkins, 28 Mo. 366; Kirk v. Hartman, 63 Pa. St. 97; Balsbaugh v. Frazer, 19 id. 95; Ludlow v. Dale, 62 N. Y. 617; Steinburg v. Gebhardt, 41 Mo. 519.

² Coleman v. Simpson, 2 Dana, 166; Downing v. Major, id. 228; Weston v. Davis, 24 Me. 374; Smith v. Davis, 45 N. H. 566; Updike v. Tenbroeck, 32 N. J. L. 105; Lewis v. Trickey, 20 Barb. 387; Bergen v. Wemple, 30 N. Y. 319; Rickets v. Sisson, 9 Dana, 358; Erben v. Lorrillard, 2 Keyes, 567; Spencer v. Storrs, 38 Vt. 156.

³ Stowe v. Buttrick, 125 Mass. 449.

⁴ Coleman v. Simpson, *supra*.

circumstances indicating a concurrence of the minds of the parties.¹ The duty to pay for services may be imposed by law, under the fiction of an implied promise, where there was neither promise nor intention to pay, as where the performance of service has been procured by fraud.²

A promise by the employer is generally implied to make reasonable compensation for services rendered, unless there are circumstances which negative that implication.³ Where a person renders service for another, relying solely upon his generosity, and expecting to be compensated by a legacy, he cannot, when disappointed in such expectation, maintain an action at law for the value of such service.⁴ It is, however, settled that a contract to pay for services by will is valid;⁵ and where the promise is of a specific sum by bequest, that sum may be recovered;⁶ or, if the promise is of a specific portion of the estate, its value will be the measure of recovery.⁷ So, a general promise to make compensation in the promisor's will, will entitle the promisee to maintain an action against the personal representative for reasonable compensation, if the promise be not fulfilled.⁸ Any circumstances will suffice to give such right of action, if they negative any inference that the services were gratuitous, or that the matter of paying for them was left to the will and pleasure of the employer.⁹ On the other hand, if the services

¹ Wilder v. Stanley, 49 Vt. 105; Buck v. Worcester, 43 Vt. 2; Curley v. Jenkins, 46 id. 721.

² Ramsey v. N. E. Ry. Co. 14 C. B. N. S. 641; 32 L. J. C. P. 244; Morrison v. Bradley, 5 Cal. 503.

³ Alexander v. Worman, 6 H. & N. 100; 30 Law J. Ex. 198; Higgins v. Hopkins, 3 Exch. 166; Poucher v. Norman, 3 B. & C. 744; Kingston v. Kelly, 18 L. J. Ex. 360; Lewis v. Frickey, 20 Barb. 387; Boylan v. Holt, 45 Miss. 277. In Hay v. Walker, 65 Mo. 17, it was held that in order to raise an implied contract to pay for labor, it was not necessary there should have been an intention on the part of the laborer during his service to charge therefor; it is suffi-

cient that the person for whom the labor is done expected to pay for it.

⁴ Granding v. Reading, 10 N. J. Eq. 370; Osborn v. Guy's Hospital, 2 Str. 728; Le Sage v. Conssmaker, 1 Esp. 189; Little v. Dawson, 4 Dall. 111.

⁵ Redfield on Wills, pt. 2, pp. 281-2; Graham v. Graham's Ex'r, 34 Pa. St. 475; Myles v. Myles, 6 Bush, 237; Lee v. Carter, 52 Ind. 342.

⁶ Bell v. Hewitt, 24 Ind. 280.

⁷ Frost v. Farr, 53 Ind. 390.

⁸ Reynolds v. Robinson, 64 N. Y. 589.

⁹ Jacobson v. La Grange, 3 John. 199; Patterson v. Patterson, 13 id. 379; Martin v. Wright, 13 Wend. 460; Eaton v. Benton, 2 Hill, 576; Robinson v. Raynor, 28 N. Y. 494.

appear to have been rendered as a gratuitous kindness; or the facts are insufficient to show an intention to pay for them, no action will lie.¹ Thus, where a slave servant accompanied his master from the West Indies to England, and there continued in his service, without any agreement, he was held not entitled to wages.² So, guardians, executors, administrators, or other trustees, are not entitled to claim compensation for their services, except by statute or contract.³

In actions for compensation on a *quantum meruit*, the inquiry being what amount the party doing the work deserves, every fact which will tend to enhance the merit and value of his services is admissible in evidence for his benefit; and every fact which will detract from their merit and value is admissible against him, in behalf of the employer.⁴ It is a good defense to show that the work was so unskilfully, carelessly or wrongly done that the employer thereby suffered injury, or that it was for such cause useless, and had to be done over again.⁵ An employé, engaged to perform particular services, is entitled to recover therefor what they are reasonably worth, if faithfully and properly performed, notwithstanding the employer will derive no advantage from them. Thus, where an agent was employed to sell an estate, and the owner, without sufficient reason, refused to fulfil an agreement which the agent had made, a right to demand compensation accrued to him, and the amount was held to be ascertainable by the established usage.⁶ A mechanic who skilfully works out the plan given him, and in a workmanlike manner follows his employer's directions, has no concern with the success and profit of his work, or with

¹ 2 Add. on Cont. § 851. See *Swanzy v. Moore*, 23 Ill. 63.

² *Alfred v. Fitzjames*, 3 Esp. 3.

³ *Huggins v. Rider*, 77 Ill. 360; *Barratt v. Hortley*, L. R. 2 Eq. 789; *Christophers v. White*, 10 Beav. 523; *Moore v. Frowd*, 3 Myl. & Cr. 45; *Manson v. Baillie*, 2 Macq. H. L. C. 80; *Collins v. Carey*, 2 Beav. 128; *Morgan v. Hannes*, 13 Abb. N. S. 361; *Hopper v. Adees*, 3 Duer, 235; *Lansing v. Lansing*, 1 Abb. N. S. 280.

⁴ *Morris v. Redfield*, 23 Vt. 295; *Moline W. P. & M. Co. v. Nichols*, 26 Ill. 90; *Robinson v. Mace*, 16 Ark. 97; *Duncan v. Blandell*, 3 Stark. 6; *Hayselden v. Staff*, 5 Ad. & El. 153; *Gleason v. Clark*, 9 Cow. 57. See *Clark v. Fensky*, 3 Kan. 389.

⁵ *Ervin v. Epps*, 15 Rich. 223; *Farnsworth v. Garrard*, 1 Camp. 38.

⁶ *Koch v. Emerling*, 22 How. 69; *McEwen v. Kerfoot*, 37 Ill. 530. See *Walker v. Rogers*, 24 Md. 237.

the question whether it answers the purpose intended.¹ It is enough that an attorney is employed to carry a case on appeal to a higher court. He is not responsible for the merits or demerits of the appeal; he is entitled to payment for his services, and as against this claim the inquiry whether there was anything in the appeal to argue is irrelevant.² A failure to win a case is no defense, unless it is lost through the attorney's mismanagement.³ In *Brown v. Post*,⁴ it was held that commissions for procuring the charter of a vessel in the port of New York are payable as soon as the charter is effected, and do not depend upon freight being taken, or upon the voyage being completed. The plaintiffs, being ship brokers, procured for the defendants a charter of a vessel for a voyage from New York to Cape Town, and thence to Mauritius or Batavia, the freight to be a certain sum (one dollar) and five per cent. primage, in gold, per barrel. The charter party provided that the charter money should be settled, if at Cape Town or Mauritius, at a certain rate of exchange in sterling (four shillings and two pence), for the price so fixed per barrel; if at Batavia, at a certain other rate of exchange in the currency of the country (two and a half guilders), for the price so fixed. No cargo being ever shipped by the vessel, the charter was not performed. It was held that the plaintiffs were entitled to recover on their commissions five per cent. on the value in New York of the amount of sterling currency susceptible of being earned at Mauritius, under the instrument; that the percentage to be allowed the ship brokers is to be estimated, not by the ultimate profits actually derived from the adventure, but by what they would be if it were successful. So, if a physician has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure then being attributable to some peculiarity in the constitution of the patient, for which the medical man is not responsible.⁵

¹ *Rickets v. Sisson*, 9 Dana, 358.

² 2 Add. on Cont. § 876; *Kannen*

³ *Case v. Hotchkiss*, 3 Keyes, 334.

v. McMullen, Peake, 83; *Hupe v.*

⁴ *Brackett v. Sears*, 15 Mich. 244.

Phelps, 2 Stark. 480.

⁵ 6 Robt. 111.

PROOF OF THE VALUE OF SERVICES.—The value of services may be determined by customary rates, where such exist; they are then market values.¹ And upon the value of services, as upon the value of property, the opinion of witnesses, properly informed on the subject, may be taken.²

A STATUTORY DAY'S WORK.—A New Hampshire statute provided that: "In all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties; and no person shall be required, or holden to perform any more than ten hours' labor in any one day, except in pursuance of an express contract requiring a greater time." In *Brooks v. Cotton*,³ it was held that if work is done through a season at a certain agreed price per day, and the work done from time to time in a day is done and accepted without objection as a day's work, an agreement may be implied that the work done in a day, whether on an average more or less than ten hours, shall be reckoned and paid for as a day's work. Perley, C. J., said: "The employer cannot *require* the laborer to work more than ten hours in a day without express agreement; that is to say, if the laborer is called on at any time to work more than ten hours in a day, he cannot be required to do it, unless he is bound to do it by an express agreement. But we do not understand that this provision reaches to the case where a laborer hired by the month or the year has voluntarily worked more than ten hours a day. If he is to be paid at a certain rate per day, it may in such case be implied, from the nature of the employment and the conduct of the parties, that what he did in a day was to be reckoned as a day's

¹ *Stanton v. Embrey*, 93 U. S. 557; *Pfeil v. Kemper*, 3 Wis. 315.

² *Lewis v. Trickey*, 20 Barb. 387; *Ottawa University v. Parkinson*, 14 Kan. 159, 164; *Reynolds v. Robinson*, 64 N. Y. 589; *Etting v. Sturtevant*, 41 Conn. 176; *Byrne v. Byrne*, 47 Ill. 507; *Mercur v. Vose*, 67 N. Y. 56; *McCullum v. Seward*, 62 id. 316; *Shepard v. Ashley*, 10 Allen, 542; *Madden v. Porterfield*, 8 Jones' L. 166.

In *Craig v. Derrett*, 1 J. J. Marsh. 365, it was said the jury have a right to base a verdict upon their knowledge of value.

In *Madden v. Porterfield*, *supra*, it was held that it is the province of the jury to affix a value to services according to their nature and extent as proved; and that it is not necessary for witnesses to estimate their value in money.

³ 48 N. H. 50.

work. So, in *Luske v. Hotchkiss*,¹ it was held that a week's work under a contract for a fixed price per week, was work for the period of a week, and not for six periods of eight hours each; and that, consequently, a party who, under such a contract, had worked sixteen hours a day, could not recover for two weeks' work. It was considered that the only effect of the statute where a case falls within it is to release the laborer from work, and entitle him to compensation for a day's labor at the end of eight hours. If the laborer work more than eight hours in a day, unless by special request or by special agreement, he cannot claim any additional compensation for such additional work. The plaintiff contracted to conduct a coal gas establishment for the defendant, receiving a fixed sum per week as wages. The business was of such a nature as to require sixteen or more hours per day, and the contract was made with an understanding on both sides of this fact; and it was held that the case did not fall within the operation of the statute.

RECOVERY FOR ATTORNEY'S SERVICES.—If an attorney brings suit for professional services, anything which shows that the services were not of the value claimed is competent; the nature of the suit conducted, the difficulties of it, the skill required, and the skill exercised, may be shown. A trial may result successfully, and yet the attorney have been guilty of negligence. To obviate the effect of his negligence and want of skill, the client may have been put to expense; if so, the fact will reduce the value of his services.² In an action to recover counsel fees for services in a chancery suit, the papers and records therein are competent evidence to show the character of the suit, the amount involved, and what has been done in it.³ A client who has notice of the terms fixed by a bar fee bill, and employs

¹ 37 Conn. 219.

² *Nixon v. Phelps*, 29 Vt. 198; *Brackett v. Sears*, 15 Mich. 244; *Bridges v. Hall*, 13 Cal. 630; *Cox v. Livingston*, 2 W. & S. 103; *Hopping v. Quinn*, 12 Wend. 517; *Runyon v. Nichols*, 11 John. 547; *Stow v. Hamlin*, 16 How. Pr. 452; *Webb v. Browning*, 14 Mo. 354; *Smith v. Davis*, 45 N. H. 566; *Garr v. Mairé*,

1 Hilt. 498. See *Templar v. McLachlan*, 2 B. & P. N. R. 136. It was held in *Keenan v. Derflinger*, 19 How. Pr. 153, that the taxable costs are prima facie the measure of an attorney's compensation for services in an action carried to judgment.

³ *Boylan v. Holt*, 45 Miss. 277.

counsel at that bar, will be bound by the rates so fixed, on the ground that he has impliedly consented to them.¹ Attorneys at law are professional laborers who assume, by accepting a retainer, peculiar responsibilities; they are entitled to remuneration proportioned to the importance of their undertakings, and the diligence, skill and knowledge required for the proper performance of their duties. Formerly the higher grade of practitioners were presumed not to perform professional services with any mercenary view, and were unable to make any binding contract for advocacy in litigation, or to maintain any action for such services, even upon an express contract to pay them a stipulated sum, and this is now the law in England;² but this

¹ *Boylan v. Holt*, 45 Miss. 277.

² *Kennedy v. Brown*, 13 C. B. N. S. 611. This case presents a masterly and exhaustive review of the authorities and traditions upon this subject. The following are extracts from the opinion of Erle, C. J.: "The material facts upon the first question (i. e., whether there was 'no evidence of debt') are that in the course of the suit between Swifen and Swifen, the plaintiff, a barrister, became the advocate of Mrs. Swifen, who, with her husband, are now defendants; that, during the continuance of that litigation, she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same; and that after the end of the litigation, she spoke of the amount of this remuneration; and for the purpose of the present judgment, we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it. These facts are no evidence to support the verdict if the promise of the defendant did not constitute any obligation; and we are of opinion that it did not.

"We consider that a promise by

a client to pay money to a counsel for his advocacy, whether made before or after the litigation, has no binding effect; and furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

"For authority in support of these propositions, we place reliance on the fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of a contract to advocate; and as the number of precedents has been immense, the force of the negative fact is proportionately great. To this we add the tradition and understanding of the profession, both as known to living memory and as expressed in former times. Sir John Davys, *Davys' Report*, preface, page 23, declares that understanding at the beginning of the seventeenth century, when he says that 'the fees of the professors of the law are not duties certain growing due by contract for labor or service, but gifts; not merces, but

honorarium.' Sir John Davys would have ample experience of the rules of the profession from his eminence in the law; and his opinion is entitled to much weight. Lord Stowell, as appears in a work remarkable for learned research — Wallace's Reports, p. 27,—speaks of him as 'a poet, a lawyer, and a statesman, and highly distinguished in each of these characters.' Lord Nottingham declares the same understanding of the profession, in the note to Co. Littleton, 295, a., saying: 'A counselor cannot bring any action (i. e., for his fees), for he is not compellable to be a counselor; his fee is honorarium, and not a debt.' The same note contains the opinion of Mr. Butler, to the same effect, saying that in England the fees of counsel are honorary in the strict acceptance of the word. Blackstone also (vol. III, p. 28) declares the same understanding: 'A counsel can maintain no action for his fees, which are given, not as *locatio* and *conductio*, but as *quiddam honorarium*, not as salary or hire, but as mere gratuity.' As we know of no authorities that conflict with these, we only add the names of the judges who have had occasion to declare an opinion to the same effect; and they are Lord Hardwicke (*Thornhill v. Evans*, 2 Atk. 330), Lord Kenyon (*Turner v. Phillips*, Peake's N. P. C. 166), Kendersley, V. C. (*Re May*, 4 Jurist, N. S. 1169), Pigot, C. B. (*Hobart v. Butler*, 9 Ir. C. L. N. S. 157), and Bayley, J., and Best, J. (*Morris v. Hunt*, 1 Chit. 544). These are authority for holding that the counsel cannot contract for his hire in litigation. The same authorities we rely on to show that the client cannot contract for the services of the counsel in litigation. There is the same absence of any precedent for

such an action, and the reason for the one incapacity is good for both.

"The facts of the present case forcibly show some of the evils which would attend both on the advocate and the client, if the hiring of counsel was made binding. In this case, the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount; and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict of 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured to her by her former advocate with the perils and the miseries of wearisome litigation, derived from her later advocate, the contrast may suggest that gratuitous advocacy is preferable to contract as a mode of remunerating advocates.

"But it is not merely on such considerations as these that this law is based. The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz.: the administration of justice.

"We are aware, that, in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty.

scruple, and the disability based thereon, do not extensively prevail in this country. All grades of practitioners may contract their services and recover for them.¹ And, in many

His faculties and acquirements are tested by a ceaseless competition, proportioned to the prize to be gained, that is, wealth, and power and honor without, and active exercise for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy, proportioned to the magnitude of those interests. If the law is, that the advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's rights, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

"If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of

popular clamor and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client; and such men are the guaranties for the maintenance of his dearest rights: and the words of such men carry a wholesome spirit to all who are influenced by them.

"Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates would be degraded. It may also be, that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law, against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive." See *Brown v. Kennedy*, 33 L. J. Ch. 71, 342; *Visch v. Russell*, 3 Q. B. 928; *Mostyn v. Mostyn*, L. R. 5 Ch. 457.

¹ *Ames v. Gilman*, 10 Met. 239; *Thurston v. Percival*, 1 Pick. 415;

states, statutes have been passed expressly authorizing attorneys to fix the measure and mode of their compensation by agreement with their clients. But, on account of their confidential relations, their contracts are subject to careful scrutiny for the protection of the client.¹ Attorneys and solicitors are entitled to have allowed them for their professional services what they reasonably deserve to have for the same, having due reference to the nature of the service, and their own standing in the profession for learning and skill; and, for the purpose of aiding the jury to determine that matter, it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court.²

FOR BROKERS.—Where a broker, pursuant to his employment, or the instructions of his principal, sells goods to arrive, he may recover his commissions, though the goods do not arrive. In such a case, the broker does all he undertook, and should

Stevens v. Adams, 23 Wend. 57; Adams v. Stevens, 26 id. 451; Wilson v. Burr, id. 386; Merrett v. Lambert, 10 Paige, 352; Wallis v. Lanbat, 2 Denio, 607; Case v. Hotchkiss, 3 Keyes, 334; Smith v. Hill, 13 Ark. 173; Smith v. Davis, 45 N. H. 565; Cregier v. Cheesbrough, 25 How. Pr. 200; Brackett v. Sears, 15 Mich. 244; Stevens v. Monges, 1 Harr. (Del.) 127; Duncan v. Breithaupt, 1 McCord, 149; Clendinen v. Black, 2 Bailey, 488; Christy v. Douglass, Wright (Ohio), 485; Baird v. Ratcliffe, 10 Tex. 81; Webb v. Brown- ing, 14 Mo. 354; Newman v. Wash- ington, Mart. & Yerg. 79; Rust v. Lane, 4 Litt. 411; Caldwell v. Shep- herd, 6 T. B. Mon. 389; Foster v. Jack, 4 Watts, 334; Baulspagh v. Fraser, 19 Pa. St. 95; Dubois' Appeal, 38 id. 231; Lichty v. Hayne, id. 434; Maynard v. Briggs, 26 Vt. 94. In New Jersey, an action will not lie to recover counsel fees, unless, per- haps, there is an express contract.

Seely v. Cram, 5 N. J. L. 35; Van Atta v. McKinney, 16 id. 235. See Hyer v. Little, 20 N. J. Eq. 443.

¹Stanton v. Haskin, 1 McArthur, 558; Rose v. Myratt, 7 Yerg. 30. In Le Catt v. Sallee, 3 Port. 115, it was held that an agreement made by a client with his counsel, after the latter had been employed in a particular business by which the original contract was varied, and greater compensation secured to the counsel than was at first agreed upon, is invalid, and cannot be enforced; that if a bond or other security for a greater compensation be taken from a client by an attorney during their connection, it will, upon an application to a court of equity, be either set aside or ordered to stand only as security for the sum to which the attorney would have been entitled if no such security had been given.

²Stanton v. Embry, 93 U. S. 537; Vilas v. Downer, 21 Vt. 419.

not be deprived of compensation because, without his fault, the event upon which the contingent agreement would become absolute did not take place.¹ So, where a broker who was employed to obtain a loan of nine thousand dollars, and was promised one per cent. commission, found a person willing to make a loan of seven thousand dollars, which the principal agreed to take, but afterwards declined, such broker was held entitled to his commission, and an allowance at the agreed rate was affirmed.² Where no custom to the contrary is shown, a broker, like any other person who performs service for another, is entitled to compensation; and it matters not whether what he has done prove beneficial to the party who employs him or not; if he has fully performed what he undertook to do, he is entitled to be remunerated for his services.³

If a mercantile usage prevails, and is shown, by which nothing is to be allowed to the broker unless the matter brought about by his instrumentality is completed, he can only recover in accordance with it, and especially where, by such usage, a larger compensation is allowed by reason of the contingency.⁴ In such case, the claim of the broker rests upon the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and, if that is not satisfied, no claim at all arises, for no other contract can be implied.⁵ Where an agent employed, for an agreed commission, to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labor; he is not bound to resort to a special action for the withdrawal of the authority; the contract to pay, in such a case, what is reasonable, is implied by the law; it is not a question of fact for a jury; and the proper measure of damages is the entire amount of the agreed commission.⁶

¹ Paulsen v. Dallett, 2 Daly, 40.

² Van Lien v. Byrnes, 1 Hilt. 133.

³ Id.; Read v. Rann, 10 B. & C. 438; Dalton v. Irwin, 4 C. & P. 289; Broad v. Thomas, 7 Bing. 99.

⁴ Broad v. Thomas, 7 Bing. 99.

⁵ Read v. Rann, supra.

⁶ Prickett v. Badger, 1 C. B. N. S. 296; Planche v. Colburn, 8 Bing. 14; Moses v. Bierling, 31 N. Y. 462; Doty v. Miller, 43 Barb. 529; Middleton v. Findley, 25 Cal. 76; Knapp v. Wallace, 4 N. Y. 477; Cook v. Fiske, 12 Gray, 491; Cook v. Welch, 9

If a broker is employed, and no special compensation is agreed on, the customary rate of brokerage is the proper rate or compensation for his services.¹ But if one not a broker is employed to negotiate, he is entitled to the reasonable worth of his services, which may be more or less than the usual brokerage.² The right of one rendering services for another to have their value estimated under a *quantum meruit*, upon the basis of commissions, can only arise out of general custom.³ The broker must perform his duty in such manner as to reasonably answer the intended purpose; and if he performs it so loosely that his principal can obtain no benefit from it, the agent can recover no compensation.⁴ And an agent will forfeit his right to compensation by misconduct.⁵

VARIOUS MODES OF COMPENSATING SERVICES.—Contracts providing specific compensation for services thereby fix, as has been stated, the measure of damages recoverable on the performance of the stipulated work. This compensation may be a share of net profits in a business;⁶ a share of crops to be

Allen, 350; Wheeler v. Knaggs, 8 Ohio, 169; Evrit v. Bancroft, 22 Ohio St. 172; Rees v. Spruance, 45 Ill. 308; Chilton v. Butler, 1 E. D. Smith, 150; Morgan v. Mason, 4 E. D. Smith, 636; Short v. Millard, 68 Ill. 292; Glenworth v. Luther, 21 Barb. 145; McGavock v. Woodlief, 20 How. U. S. 221; Clapp v. Hughes, 1 Phil. 382; Bailey v. Chapman, 41 Mo. 536; Stillman v. Mitchell, 2 Robt. 523; Edwards v. Goldsmith, 16 Pa. St. 43.

The plaintiff consigned to the defendant 497 barrels of whisky, to be sold on commission of two and a half per cent.; defendant sold 84 barrels; the plaintiff sold 220 barrels and gave an order on the defendant for delivery of them. Defendant having complied with the order, refused to deliver the remaining 193 barrels without being paid commissions on the whole, which the plaintiff paid, and brought suit to

recover back all the commissions except on the 84 barrels; held, that the defendant was entitled to commissions on the 220 barrels, and such part of the agreed commission as was in proportion to the trouble and risk he had for the balance unsold; such proportion as the service and risk incurred bore to the whole trouble and risk of making sale; and was bound to refund what had been demanded beyond that sum. Briggs v. Boyd, 65 Barb. 197.

¹ Erben v. Lorillard, 2 Keyes, 567.

² Id.; Dyer v. Sutherland, 75 Ill. 583.

³ Id.

⁴ Hammond v. Holiday, 1 C. & P. 384. See Hill v. Featherstonhaugh, 7 Bing. 569.

⁵ Sea v. Carpenter, 16 Ohio, 412; Segar v. Parrish, 20 Gratt. 672.

⁶ Wiggins v. Graham, 51 Mo. 17; Morrison v. Galloway, 2 Har. & J. 461.

raised on a farm;¹ such sum as can be raised by voluntary subscriptions for the purpose of such compensation;² or wages may, by agreement, be specific property, in which case, if not delivered or transferred, the employé may recover its value, when he is entitled to receive it, with interest.³

If the employer is in no default in the payment, he has a right to make it in the very mode specified in the contract of hiring. Thus, the plaintiff agreed that his minor son should work for the defendant for a certain time, to be compensated by the defendant boarding, clothing and schooling the son; the son worked a part of the time and then voluntarily abandoned the defendant without his consent; it was held that the law would not imply a promise to pay in money what the services of the son were reasonably worth, beyond the damages caused by the son's failure to complete the contract, the defendant being always ready to pay in the manner stipulated. The same rule applies though the contract is void by the statute of frauds. If the employer is willing to abide by the void contract, has not repudiated it, or done anything to put it out of his power to fulfil it, he cannot be made to pay in any other mode. The existence of such a contract will negative any tacit promise to make payment in any manner or on any terms different from those mentioned in such contract.⁴ But where a contract pro-

¹Owens v. Durham, 5 Dana, 536.

²Myers v. Baptist Society, 38 Vt. 614. In this case, the defendant, a religious society, engaged the plaintiff to become their pastor for one year for \$300. About the commencement of the second year, the defendant informed him that the amount subscribed was less than that of the first year, and he agreed to remain for such sum as could be raised by subscription, the defendant to collect the subscriptions. The defendant having failed to collect and pay over the subscriptions in full, the plaintiff commenced an action to recover for his services as pastor, he having continued as such for the defendant for five years un-

der the same agreement. It was held that the contract was one of hire through the whole time, under which the defendant was bound to pay the plaintiff for his services; that the defendant was bound to use due diligence in obtaining and collecting subscriptions, and the plaintiff was entitled to recover such an amount as might have been collected.

³Strutt v. Farlar, 16 M. & W. 249; Owens v. Durham, 5 Dana, 536; Stone v. Stone, 43 Vt. 180.

⁴Roundy v. Thatcher, 49 N. H. 526; Campbell v. Campbell, 65 Barb. 639; Abbott v. Draper, 4 Denio, 51; Quackenbush v. Ehle, 5 Barb. 469.

viding for a fixed compensation for services and a particular mode of payment is void by the statute of frauds, for not being in writing, if the employer violate or repudiate it, after services have been performed under it, they may be recovered for on a *quantum meruit*, as services performed on request, without regard to the rate or mode of compensation contemplated in such contract.¹ If, by such a contract, the services were to be paid for by conveyance of specific land, the contract being verbal and void, the value of the land, on a *quantum meruit*, is not the fixed measure of damages. But it has been held that such value is competent evidence to be considered on the question of damages.²

Where the contract, being verbal, was void because not to be performed within a year, provided for service for two years, at one hundred dollars for the first year, and two hundred dollars for the second; and was proved on the trial, and was the only evidence tending to show any understanding between the parties in respect to the compensation for the second year, an instruction that if during the second year the parties understood that the wages were to be two hundred dollars, the amount would be fixed by that understanding, was held erroneous;³ for otherwise the statute would be evaded by giving effect to the contract.⁴

PRESUMPTION OF SAME TERMS WHERE EMPLOYÉ CONTINUES WORK.
If a person enter the service of another under an express contract specifying the time and wages, and he continues in the same employment after this term has ended, without any new bargain, he will be considered as working under the original contract, or as re-engaged on the same terms.⁵

¹Rodman v. Woolman, 2 Houst. 581; Watson v. Watson, 1 id. 209; Jones v. Hay, 52 Barb. 501; Updike v. Tenbroeck, 32 N. J. L. 105; William B. St. Co. v. Atkinson, 68 Ill. 421. See King v. Brown, 2 Hill, 485.

²Ham v. Goodrich, 37 N. H. 185; Abbott v. Draper, 4 Denio, 51.

³Emery v. Smith, 46 N. H. 151.

⁴Earl of Falmouth v. Thomas, 1

C. & M. 89; King v. Brown, 2 Hill, 485; Hill v. Hooper, 1 Gray, 131.

⁵Grover & Baker S. M. Co. v. Bulkley, 48 Ill. 189; Huntingden v. Claffin, 38 N. Y. 182; Vail v. Jersey Little Falls M. Co. 32 Barb. 564; Nicholson v. Patchin, 5 Cal. 474; Rauck v. Albright, 36 Pa. St. 367. See Castigan v. Mohawk, etc. R. R. Co. 2 Denio, 609.

NECESSITY OF FULL PERFORMANCE OF AN ENTIRE CONTRACT.—The general principle is, that where there is an express contract none can be implied relating to the same subject. It is a principle of pretty extensive application. On this principle, and so far as it governs, if work is done under a special contract, recovery for it can be had only by action on the contract, or at least where an action on the contract could be maintained; and when it appears that compensation has been earned, and is due according to its provisions. Accordingly, under an agreement which is entire, to pay a gross sum for a particular term of service, or for doing a particular piece of work, the doing of the work is a condition, and no action can be maintained on the contract without alleging and proving that the condition has been fulfilled. Hence, unless there is some exception to the general principle excluding any implied promise, where there is an express contract, and to the consequent rule requiring the action to be brought on the contract, there can be no recovery for part performance of an entire contract, however beneficial it may be to the employer. There are exceptions both as to the necessity of suing upon the contract, and also as to the right to recover only upon complete performance; but they do not embrace all cases of part performance. In respect to contracts for services, the rigorous rule is generally enforced; and where there is a hiring for a particular term as an entire contract, there can be no recovery, if the party hired voluntarily quits, without cause or the consent of his employer, before the expiration of that term.¹

¹ *St. Albans Steam B. Co. v. Wilkins*, 8 Vt. 54; *Sherman v. Transportation Co.* 31 Vt. 162; *Henderhen v. Cook*, 66 Barb. 21; *Lewis v. Esther*, 2 Cranch C. C. 423; *Bowling v. Varmans*, 2 id. 423; *Shaw v. Turnpike Co.* 3 Penn. 445; *Krouse v. Deblois*, 1 Cranch C. C. 156; *Hutchinson v. Witmore*, 2 Cal. 310; *Hogan v. Tetlow*, 14 Cal. 255; *Schnerr v. Lemp*, 19 Mo. 40; *Winn v. Southgate*, 17 Vt. 355; *Patuate v. Sanders*, 41 Vt. 66; *Holmes v. Stummel*, 24 Ill. 370; *Bellinger v. Craigue*, 31

Barb. 534; *Clark v. Gilbert*, 32 Barb. 576; 26 N. Y. 279; *Halloway v. Lacy*, 4 Humph. 468; *Olmstead v. Beals*, 19 Pick. 528; *Stark v. Parker*, 2 Pick. 267; *Geohan v. Dailey*, 4 Ala. 336; *Whitney v. Murray*, 34 Ala. 155; *Greene v. Linton*, 7 Port. 133; *Suber v. Vanlew*, 2 Spears, 126; *Abernathy v. Black*, 2 Cold. 314; *Posey v. Garth*, 7 Mo. 94; *Caldwell v. Dickson*, 17 id. 575; *Hinson v. Hampton*, 32 id. 408; *Aaron v. Moore*, 34 id. 79; *Larkin v. Buck*, 11 Ohio St. 561; *Noon v. Salisbury*

There is a like inability in England to recover for part of the service stipulated for, or wages for the current broken period in an entire contract, where the employé is discharged by his employer for good cause.¹ The rule has been so held in this country where the servant has been discharged for criminal violations of his duty.² The general rule, when a servant is discharged for cause, is to allow him his wages to the time of discharge, but subject to deductions for his torts or deficiencies.³ When a laborer or other employé, professing to be skilled in some particular work, art or mystery, has been hired on that account, and for the exercise of the professed skill, and is found to be incompetent to do what he undertook, the employer is not obliged to go on employing him to the end of the term, but

Mills, 3 Allen, 340; Cushman v. Sim, 2 Harr. & J. 352; Dover v. Plemmons, 10 Ind. 23; Brown v. Kimball, 12 Vt. 617; Cahill v. Patterson, 30 id. 592; Ewing v. Ingram, 24 N. J. L. 520; Hughes v. Cannon, 1 Sneed, 622; Marsh v. Rulisson, 1 Wend. 514; Hansell v. Erickson, 28 Ill. 251; Angle v. Hanna, 22 id. 429; Mullen v. Gilkinson, 19 Vt. 503; Ripley v. Chipman, 13 id. 263; Hubbard v. Belden, 27 id. 645; Patrick v. Putnam, id. 759; Forsyth v. Hastings, id. 646; Mack v. Bragg, 30 id. 571; Hennessey v. Farrell, 4 Cush. 267; Davis v. Maxwell, 12 Met. 286; Jewell v. Thompson, 2 Litt. 52; Wright v. Wright, 1 id. 179; Morford v. Ambrose, 3 J. J. Marsh. 688; Rounds v. Baxter, 4 Me. 454; Miller v. Goddard, 34 id. 102; Green v. Gilbert, 21 Wis. 395; Evans v. Bennett, 7 id. 404; Henderson v. Stiles, 14 Ga. 135; Codey v. Raynaud, 1 Colo. 272; State v. Beard, 1 Ind. 469; De Camp v. Stevens, 4 Blackf. 24; Jennings v. Camp, 13 Jchn. 94; Webb v. Duckingfield, 13 John. 390; Lantry v. Parks, 8 Cow. 63; McMillan v. Vanderlip, 12 John. 165; Wolfe v. Howes, 20 N. Y. 197; Monell v.

Burns, 4 Denio, 121; Taft v. Montague, 14 Mass. 283; Preston v. American Linen Co. 119 Mass. 400. In Hughes v. Cannon, 1 Sneed, 622, the court refer to several Tennessee cases of special contract for particular works, where a liberal rule for recovery on a *quantum meruit* for part performance had been laid down, and say of them: "Without impugning the rule laid down by this court in the cases referred to, where benefit has been conferred by the use of materials or valuable things furnished under contracts, we hold that it is different in the case of contracts for personal service."

¹ Atkin v. Acton, 4 C. & P. 208; Ridgway v. Hungerford Market Co. 3 A. & E. 171; Walsh v. Walley, L. R. 9 Q. B. 367; 43 L. J. Q. B. 102; Turner v. Robinson, 6 C. & P. 15.

² Libhart v. Woods. 1 W. & S. 265.

³ Murdock v. Phillips Academy, 12 Pick. 244; Carroll v. Welch, 26 Tex. 147; Green v. Hulett, 22 Vt. 188; Taylor v. Peterson, 9 La. Ann. 251; Congregation of Child. of Israel v. Peres, 2 Cold. 620; Eaken v. Harrison, 4 McCord, 142.

may at once dismiss him.¹ So he may be dismissed for misconduct which involves a violation of duty in his employment or position.²

The requirement to fulfil the precedent condition to do the entire work for which an entire sum is promised to be paid, results as a logical conclusion from such a contract; it is thus derived from the supposed intention of the parties, because they are held to mean what the contract thus expounded requires. What is done, short of full performance, being referable exclusively to the contract, there is no operative promise to pay for it, the express promise excluding any other, and not itself available until all the work is done. There is no defect in the logic of this rule; and it may be said that as it never applies except to carry out the intention of the parties, it is not to the rigor of the law, but to the improvidence of the contract, that any hardship of individual cases must be ascribed. It is true the employé might stipulate for a different rule, or an exception, if he should be prevented by sickness or death from completely fulfilling; and it may be deemed his fault that he has entered into a contract in such form that in no event but that of full performance he can claim any compensation. Formerly this logic was law, invariably enforced; the intention of the parties, deduced from a construction of their contract, was the iron rule and law of the contract, not dispensable, or subject to any legal evasion or mitigation. Thus it was held that where a sailor, hired for a voyage, took a promissory note from his employer for a certain sum, provided he should proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he died, no wages could be claimed either on the contract or on a *quantum meruit*.³ The intention of the parties is still the rule and

¹ Horton v. McMurtey, 5 H. & N. 667.

² Harmer v. Cornelius, 5 C. B. N. S. 235; Robinson v. Hindman, 3 Esp. 235; Atkin v. Acton, 4 C. & P. 208; Lilley v. Elwin, 11 Q. B. 742; Ard- ing v. Lomax, 24 L. J. Ex. 80; S. C. 10 Ex. 734; Shaw v. Chairitie, 3 C. & K. 25; Spain v. Arnott, 2 Stark.

256; Read v. Dunsmore, 9 C. & P. 588; Lacy v. Osbaldiston, 8 C. & P. 80; Turner v. Mason, 14 M. & W. 112; Amor v. Tearon, 1 Perry & D. 398; Wise v. Wilson, 1 Car. & K. 662; Lamby v. Gage, 2 E. & B. 216.

³ Cutler v. Powell, 6 T. R. 320; 2 Smith's Lead. Cas. 17.

law of contracts, and even in the matter of performing conditions precedent there has been slight amelioration of the rule. If a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.¹

DISPENSATION IN CASE OF INABILITY.—The rule which binds parties to fulfil contracts has been somewhat relaxed by applying an equity to relieve against penalties, and by admitting exceptions to the principle that an express contract excludes an implied promise on the same subject. This implication of a promise is so purely a fiction to enforce an equitable duty, that, in this class of contracts, the implication is sometimes that of a proviso to the express contract leading to the same result. Thus, it is now well settled that if the employé is prevented by sickness or death from performing an entire contract for labor, where such performance is by the terms of the contract a condition precedent to the right to claim any compensation, he will not, for such failure, be denied all right to be paid for what he has done.²

The election of an attorney to the bench was held to afford such excuse for not completing contracts for professional services; that he could recover for part performance on a *quantum meruit*.³ So when the contract was dissolved by the servant being called away as a witness.⁴ In *Smith v. Hill*,⁵ a firm of lawyers contracted with a client for the personal services of a particular partner. It was held that if he failed to perform the services,

¹ *Dermott v. Jones*, 2 Wall. 1; *Paradyne v. Jayne*, Alleyn, 26; *Beal v. Thompson*, 3 B. & P. 405; *Beebe v. Johnson*, 19 Wend. 500.

² *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, id. 759; *Wolfe v. Howes*, 20 N. Y. 197; S. C. 24 Barb. 174; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brown*, 11 Met. 440; *Jones v. Judd*, 4 Comst. 412; *Fahy v. North*, 19 Barb. 341; *Hunter v. Waldron*, 7 Ala. 753; *Green v. Lin-*

ton, 7 Port. 133; *Dickey v. Lenscott*, 20 Me. 453; *Smith v. Hill*, 13 Ark. 173; *Moulton v. Trask*, 9 Met. 577; *Harrington v. Fall River Iron Works Co.* 119 Mass. 82; *Clendinnen v. Black*, 2 Bailey, 488; *Callahan v. Shotwell*, 60 Mo. 398.

³ *Baird v. Ratcliffe*, 10 Tex. 81.

⁴ *Melville v. De Wolf*, 4 E. & B. 844.

⁵ 3 Ark. 173.

though it was a breach of the contract, the damages would be but nominal, if another partner had performed the stipulated service with equal professional skill, and without injury to the client; that such a contract cannot be abandoned by the client upon the death of the partner whose services he has engaged, without tendering to the survivor a fair compensation for the services already rendered; and if the surviving partner render the service with due professional skill and diligence, he will be entitled to the entire fee. But the amount of recovery will be reduced by any damage sustained by the employer in consequence of the contract not being strictly and literally performed.¹

In a New York case,² it is said: "This rule is equitable, and it should be applied to such cases, although the servant is not to be regarded as violating his contract in consequence of his inability fully to perform it, by reason of his sickness or death. His failure fully to perform his contract for such a cause is his misfortune and not his fault; and his employer should neither gain nor lose by it. . . . Much more might be said in favor of this rule, but it needs no vindication; it is so well grounded in good sense, it sufficiently commends itself. It may be said to be a common sense rule, and common sense is the basis of all just law." In an explanatory note to this case, it is said that some of the judges dissented from the idea that the person employed, not being in fault in dying, could be treated as liable to damages to compensate the employer for a reduction of the profits in the further prosecution of the work, arising from the loss of such employé's services. In such cases, however, such allowance to the employer is not strictly damages; that allowance is essential to a fair apportionment of wages earned on the basis of the contract.

In *Jones v. Judd*,³ an action was brought by sub-contractors for part of the work of constructing the Genesee Valley Canal. This contract was with the party who had contracted with the state, and their contract specified one price per yard for excavation and another for embankment, and provided for the employer to reserve ten per cent. until the final estimate. The

¹ *Smith v. Hill*, 3 Ark. 173.

³ 4 N. Y. 412.

² *Clark v. Gilbert*, 26 N. Y. 279.

defendant proved, on the trial, that the work done was worth less than the contract prices, and offered to prove that the remaining work was more difficult and would be more expensive, but this evidence was rejected. The court of appeals, evenly divided on the question, held it was properly rejected; and as it appears to the writer, erroneously, on the general theory of the prevailing opinion; for the plaintiffs were thus permitted to recover more than was due, on the basis that the defendant was not at fault, and therefore not liable to damages. In such an adjustment, the contract price uniform for all the work, would not be due for a part relatively easier and less expensive to do. Gardiner, J., said: "If the contract had been performed by the plaintiffs, they might have recovered upon the special agreement, or upon the common counts, and in either case they would be entitled to the price fixed by the agreement.¹ If the performance had been arrested by the act or omission of the defendant, the plaintiffs would have had their election to treat the contract as rescinded, and recover on the *quantum meruit* the value of their labor, or they might sue upon the agreement and recover for the work completed according to the contract, and for the loss in profits or otherwise which they had sustained by the interruption.² In this case the performance was forbidden by the state. Neither party was in default. All the work for which recovery was sought was done *under the contract*, which fixed a precise sum to be paid for each yard of earth removed without regard to the difficulty or expense of the excavation. If the plaintiffs had commenced with the more expensive part of the work, they could not, under the circumstances, have claimed to have been allowed for the profits to arise from that portion which they were prevented from completing. Such an allowance is predicated upon a breach of the contract by the defendant.³ The defendants, in the language of Judge Beardsley, 'are not by their wrongful act to deprive the plaintiff of the advantage secured by the contract.' Here there was no breach of the agreement by either party. The plaintiffs could not recover

¹ Phil. Ev. 109, 2d ed.; Dubois v. Del. & H. Canal Co. 4 Wend. 285, and cases cited.

² Lenningdale v. Livingston, 10

John. 36: 9 B. & C. 145; Masterton v. Mayor of Brooklyn, 7 Hill, 69.

³ 7 Hill, 71, 73.

profits, and the defendant cannot, consequently, recoup them in this action.¹ Again, the plaintiffs assumed the risk of all accidents which might enhance the expense of the work while the contract was subsisting;² and are entitled, consequently, to the advantages, if any, resulting from them. The suspension of the work, by state authority, was an accident unexpected by either party. It was one which, under the offer, we are bound to assume was of benefit to the plaintiffs. But the defendant cannot require an abatement from the agreed price for what has been done, unless he could demand it in case a flood had partially excavated or embanked the section of the canal to be completed by the plaintiffs."

In *Fahy v. North*,³ a laborer was hired for a year to work on a farm, commencing in November. He worked until July, when he was taken sick; he was taken care of in the employer's family, and after three weeks recovered and offered to work his time out, which the employer would consent to if the party employed would allow twenty dollars damages for the time lost in his sickness. The court held that this claim of damages was not admissible, and that requiring such an allowance as a condition to permitting him to resume work, justified him in departing, and gave him a right to recover on a *quantum meruit*. The claim of twenty dollars damages seems to have been rejected because none could be claimed; not because they were excessive. On a just apportionment under such a contract, if it appeared that the services of the laborer would be more valuable during the time lost by his sickness than during other parts of his term of service, his wages for the time he served should be proportionately less; otherwise the laborer's sickness would not be his but his employer's misfortune. In this case the servant recovered fifty cents a month less than the employer was bound by the contract to pay him. There is an implication that this deduction was deemed wrong in the allusion of Balcom, J., to this case in *Clark v. Gilbert*.⁴ And yet the learned judge, continuing, said: "There is no case which

¹ *Blanchard v. Ely*, 21 Wend. 346.

² *Boyle v. Canal Co.* 22 Pick. 384;

Sherman v. Mayor of New York, 1 Comst. 316.

³ 19 Barb. 341.

⁴ 26 N. Y. 283.

holds that where the full performance of a contract for personal services is prevented by the sickness or death of the party who was to render the services, a greater compensation can be recovered than the stipulated value, on proof that the services were worth more than such value. But there are decisions that the recovery in such a case cannot exceed the contract price, or the rate of it for the service performed.¹ This apportionment should be so made that all loss which must result from the contract not being fully performed will fall on the party whose misfortune caused it, or by whose sickness or other providential disability the complete performance has been prevented. In other words, the compensation for part performance should be determined on the basis of the benefit of it to the employer, considering the obligation and consideration of the whole contract.²

If a household servant hired for a year, or any aliquot portion of a year, is hurt or temporarily disabled, or falls sick whilst doing his master's business, the master is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his ordinary work; but if he has been struck down with disease and permanently disabled, so that he can never be expected to resume his work, the contract of hiring is dissolved, and the master may dismiss him.³

In contracts for personal services for a stipulated time, whether for manual labor, or where skill is required or confidence reposed, the contract can be performed only by the very person employed. In such cases, the contract is understood to

¹ *Coe v. Smith*, 4 Ind. 79; *Allen v. McKibben*, 5 Mich. 449. The doctrine was asserted in *Allen v. McKibben* that the servant cannot be permitted to gain by his sickness, nor can the employer be permitted to lose by it. See *Walker v. Norton*, 29 Vt. 230.

² *Wolfe v. Howes*, 20 N. Y. 197. In *Nichols v. Coolahan*, 10 Met. 449, there was a hiring by the month for stated wages, including board. After several months' work the laborer be-

came sick and continued so for three weeks. It was held that he was not chargeable for board nor entitled to wages during that time.

In *Fahy v. North*, *supra*, the employé was charged for his care and board while sick.

³ 2 Add. on Cont. § 894; *Rex v. Sudbrooke*, 1 Smith, 59; *Chandler v. Grieves*, 2 H. Bl. 606, n.; *Cuckson v. Stones*, 1 Ell. & Ell. 248; 28 L. J. Q. B. 25.

be on the condition that health and life continue; and, therefore, when inability from such cause arises to commence or to continue in the employment, performance is excused, and for any work done there may be a recovery on a *quantum meruit*.¹ The justice and reason of this rule are clearly and forcibly explained by Storrs, J.:² "It is difficult to reconcile the reported cases on the subject of the liability of an employer of a person who is hired to labor for a specified time on wages to be paid at the expiration of that time, where such person has, without his fault, failed to labor for the whole time; or to extract from them any defined rule. There is much confusion in them which seems to have arisen from the different views entertained by the courts, on the question whether such contract of hiring is to be governed by the principle which prevails in regard to a contract to do a specific piece of work, as to build a house, or a machine, for a particular sum; in which case the contract is held to be entire, and the performance of it a condition precedent to any right of action against the employer, and the non-fulfilment of it is not excused by inevitable necessity. We do not propose to examine those cases in detail. In the earliest of them it was established that the same principle applied to both of these species of contracts, and that, therefore, where the service of a person hired to labor for a specified time ceased within that time, there could be no apportionment of wages for the actual time of service, and, consequently, no recovery for the services rendered during such time. But this rigid and unreasonable rule has recently been relaxed, and it is now generally, if not universally, held that wages may, in particular cases, be apportioned; which, in our judgment, is much more in accordance with the true character of such a contract, the presumed intention of the parties and the demands of justice. A contract of this kind is for the personal services of the individual who is hired, and cannot be performed by the

¹ Dickey v. Lensott, 20 Me. 453; Norton, 47 N. Y. 62; Robinson v. Lakeman v. Pollard, 43 id. 463; Davison, L. R. 6 Ex. 268; Boast v. Wolfe v. Howes, 20 N. Y. 197; Frith, L. R. 4 C. P. 1; Spalding v. Ryan v. Dayton, 25 Conn. 188; People v. Manning, 8 Cow. 297; Gray v. § 36 and notes. ² Ryan v. Dayton, supra.

agency of another person, and, in this important respect, is peculiar and different from a contract by which one agrees to do a particular piece of work, as, for instance, to build a house, which may be performed through another person. It is unreasonable to suppose that the parties in such an agreement as the former, knowing that the person hired is liable to be interrupted in his labor by the act of God, or inevitable necessity, intended or expected, although there should be no express stipulation on the subject, that he should, in such an event, not only lose his services, but, as the case might be, be bound to repay his employer what he has received in payment for them. And it is obvious that the rule which would subject him to these consequences would be not only harsh, but unjust. Viewing the present as a contract for the personal services of the plaintiff, and which could only be performed by himself, we think that, from its nature, a condition was impliedly attached to it, that an inability to labor during a part of the time stipulated, produced by inevitable necessity, should so far constitute an excuse for not laboring during that period, that he should not be deprived of a right to a reasonable compensation for the service performed by him under it; and that the rule that where a person, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, which, properly understood, we do not impugn, is not applicable to such a contract.¹ In regard to a contract of this kind, we are induced to adopt, as the most suitable and just general rule, in a case where the servant leaves the service before the end of the time for which he was hired, the one laid down by Chancellor Kent,² that, unless he so leaves without reasonable cause, or is dismissed for such misconduct as justifies the dismissal, he does not forfeit a right to his wages for the period for which he has served. It should be observed, however, that we do not intend to say that, in such a case, he would be entitled to a proportional part of the sum agreed to be paid for the whole time; and that it should not be reduced so as to indemnify the employer for

¹ 1 Coke, 98; Williams v. Hide, 100; 1 Bert on Cov. 472; Nash v. Ashton, Palm. 548; 1 Shep. Touch. 180; Gil- Skin. 42.

² 2 Comm. 258-9.

the loss which he has sustained by the non-fulfilment of the agreement."

Where the right to quit at pleasure is reserved in the contract of hiring, but it is stipulated that such quitting shall be preceded by notice, a sudden going away, without notice, in consequence of sickness, will not work a forfeiture of wages already earned. The stipulation for notice will be construed to apply to a voluntary leaving.¹ And the same rule was applied where the party hired stopped work before his time expired, because he was arrested and convicted of a crime. The court say: "The stipulation [requiring two weeks' notice of intention to leave] evidently had reference only to a voluntary abandonment of the defendant's service, and not to one caused *vis major*, whether by visitation of God, or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it. He could give notice only of such departure as he could anticipate, . . . and when it was within his power to give the notice. . . . The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural consequence of some voluntary act of the person employed, or of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was to cause the termination of the employment of a party under a contract for services or labor."²

¹ Fuller v. Brown, 11 Met. 440. It was held in Hunt v. Otis Co. 4 Met. 464, that where one hires with no express agreement to continue in the service for any definite time, but with knowledge of a regulation adopted by the employers, requiring all persons employed by them to give four weeks' notice of the intention to quit, he does not forfeit his wages by quitting without giving

the notice, but he is liable for all damages caused by not giving it; and these may be deducted from the wages in a suit therefor. See Harrington v. Fall R. Iron W'ks Co. 119 Mass. 82; and Preston v. American Linen Co. id. 400.

² Hughes v. Wamsutta Mills, 16 Allen, 201; Millot v. Levett, 2 Dane's Ab. 461.

In a Vermont case, the court held that in contracts for labor, where the plaintiff is not guilty of a wilful deviation from the terms of the contract, but has failed to fulfil them, and has performed work and labor beneficial to the employer, he is entitled to recover under the general counts for work and labor; that the true rule of damages in such case is to allow for the labor according to the contract price, deducting whatever damages the employer has sustained in consequence of the work not being done according to the terms of the contract.¹

In *Wolfe v. Howes*,² Allen, J., said: "There is good reason for the distinction which seems to obtain in all the cases, between the case of a wilful or negligent violation of a contract, and that where one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially, and without fault on his part, prevented from a full performance."

This relaxation of the rule requiring full performance, as a precedent condition, of an entire contract, where disability by sickness intervenes, or there is other involuntary prevention, shows that the rule is technical, and does not in truth rest on the principle that there can exist no legal obligation to pay except on the express terms of the contract. Full performance is not excused, in such a case, on the ground that it has become impossible; nor on the ground that the employer has done some act to evince an acceptance of the benefit of part performance, after default, so as to subject him to the duty of paying independent of his special undertaking in the contract. Neither is the rule founded on the principle that the parties intended, except in the sense of a penalty,³ that beneficial part perform-

¹ *Blood v. Enos*, 12 Vt. 625.

² 20 N. Y. 201.

³ The cases very generally treat the loss of wages earned in consequence of a failure to fulfil the entire contract as a forfeiture, and hence the right to them will become absolute by mere waiver of the for-

feiture. Thus in *Patnote v. Sanders*, 41 Vt. 66, a laborer left his employer before the term of service expired, without the employer's consent and without cause. The employer, although insisting that he did not admit his liability by offering to pay the laborer for his service

ance should not be compensated; otherwise, there could be no exception when default is involuntary, as where caused by sickness or death; for no party to a contract is obliged to pay another party merely because of his disability or misfortune. The loss of all wages earned for failure of complete performance is treated as in some sort a penalty, but a wholesome one, to secure a full and faithful execution of contracts. When, therefore, there is an earnest and *bona fide* endeavor to fulfil, frustrated by sickness or other similar cause, the penalty is taken off, and the employé is then entitled to recover on a quantum meruit. The rule against any implied promise where there is an express promise does not apply; an exception is admitted. And this exception being based on equitable grounds, it ought to embrace, but does not, all cases where the injured party would otherwise receive a benefit from part performance beyond his actual injury. A defaulting party should not be compelled to pay damages by one measure when he fails to perform a condition precedent, and is plaintiff, and another when he commits a breach of an independent stipulation of the same import, and is sued upon it. There is no essential difference between a penalty stipulated to be paid, if a condition of defeasance is not performed, and a penalty in a sum withheld. In the former case, in equity as well as at law, the obligor is relieved from paying more than the actual damage the injured party has suffered from the deficient performance of the condition. Why should he be permitted to retain, in the other case, what is equally penalty, but happens to be in his hands?¹

In several of the states, recovery on a *quantum meruit* may be had for part performance of an entire contract, though there be no cause or excuse for its abandonment, if the part performance is beneficial; and recovery may be had at the contract price, after deducting the damages resulting from the failure to perform in full.² But an action cannot be brought to recover on a

at the rate he would have received if he had labored until the end of the time agreed upon, or making a tender of the amount due at that rate, was held to have waived thereby the forfeiture of the wages for the services performed. See *Hughes v.*

Wamsutta Mills, 11 Allen, 201; *Boyle v. Parker*, 46 Vt. 243; *Wolfe v. Howes*, 20 N. Y. 197.

¹ See *Richardson v. Woehler*, 26 Mich. 90.

² *Britton v. Turner*, 6 N. H. 481; *Page v. Marsh*, 36 id. 305; *Powers*

quantum meruit until the time when the wages would be due if the contract had been performed.¹ Where the contract of hiring is for a term, but each party reserves the privilege of putting an end to it when he pleases, the servant is entitled to recover at the stipulated rate for the time he serves, although he quits upon his own motion.² Nor is a person hired by the day to work upon a particular job required to prolong his services to complete a particular piece of work he has undertaken, or upon which he may happen to be employed, unless he has restricted himself by his contract.³

An infant will not be subjected to the loss of what he has earned by failing to fulfil an entire contract for service.⁴ But if during the term for which he has engaged himself, the infant becomes of age, and he continues thereafter to work, he thereby affirms the contract, and must abide by it.⁵

v. Wilson, 47 Iowa, 666; Barr v. Van Duyn, 45 id. 228; Williams v. Donaldson, 8 id. 108; Byerlee v. Mendel, 39 id. 382; Carroll v. Welch, 26 Tex. 147; Riggs v. Horde, Suppl. to 25 Tex. 456; Coe v. Smith, 4 Ind. 82; Ricks v. Yates, 5 id. 115; Downey v. Burk, 23 Mo. 228; Wilson v. Adams, 15 Tex. 323; Robinson v. Sanders, 24 Miss. 391; Harriston v. Sale, 6 Sm. & M. 634; McClure v. Pyatt, 4 McCord, 22; Dover v. Plemmons, 10 Ired. 23; Eaken v. Harrison, 4 McCord, 142; Byrd v. Byrd, 4 McCord, 141; Lincoln v. Schwartz, 70 Ill. 134; Dobbins v. Higgins, 78 id. 440.

¹ Hartwell v. Jewett, 9 N. H. 249; Bailey v. Wood, 17 id. 365; Thompson v. Phelan, 22 id. 339; Davis v. Barrington, 30 id. 517. See Knutson v. Knapp, 35 Wis. 86.

² Evans v. Bennett, 7 Wis. 404; Steed v. McKee, 1 Dev. & Bat. 435; Coxe v. Skeen, 3 Ired. 443; Craig v. Pride, 2 Spears, 121.

³ Wyngert v. Norton, 4 Mich. 286.

⁴ Van Pelt v. Corwine, 6 Ind. 363;

Dallas v. Hollingsworth, 3 Ind. 537; Wheatley v. Miscat, 5 Ind. 142; Larkin v. Mayall, 25 N. H. 82; Nickerson v. Easton, 12 Pick. 110; Vent v. Osgood, 19 Pick. 572; Judkins v. Walker, 17 Me. 38; Lowe v. Sinklear, 27 Mo. 308; Thomas v. Dike, 11 Vt. 273; Hoxie v. Lincoln, 25 Vt. 206; Millard v. Hewlett, 19 Wend. 301; Medbury v. Watrous, 7 Hill, 110; Goffrey v. Hayden, 110 Mass. 137; Ray v. Haines, 52 Ill. 485; White-marsh v. Hall, 3 Denio, 375; Derscher v. Continental Mills, 58 Me. 217; Moses v. Stevens, 2 Pick. 332; Garner v. Board, 27 Ind. 323. See De France v. Austin, 9 Pa. St. 309; Taft v. Pike, 14 Vt. 405; Mountain v. Fisher, 22 Wis. 93; Davies v. Turton, 13 Wis. 185; Weeks v. Leighton, 5 N. H. 343; Harney v. Owen, 4 Blackf. 337; McCoy v. Huffman, 8 Cow. 84; Stone v. Dennison, 13 Pick. 1; Badger v. Phinney, 15 Mass. 359; Holmes v. Blogg, 8 Taunt. 508; Dunton v. Brown, 31 Mich. 182.

⁵ Forsyth v. Hastings, 27 Vt. 646.

ENTIRE AND APPORTIONABLE CONTRACTS.— There can be no forfeiture of wages under the rigorous rule which has been stated, unless there is a failure to perform some stipulated service which as a whole is a condition precedent. Whether a contract is entire does not depend on any formal arrangement of the words, but on the intention of the parties, as it is collected from the whole contract.¹ Contracts are entire when it is the intention of the parties that service for a specified period, or some stipulated service or work shall be entirely performed, before any part of the consideration or wages can be demanded, and then that they are to be paid in one sum. A hiring for a year for a specified sum, to be paid when the work has been done, is a plain instance of such a contract.² The intention governs, and it is manifest, in such a contract, that a year's work is to be performed before any wages are to be paid; nothing short of the agreed sum can be earned; it is a unit of compensation. Where a contract was made to completely repair certain chandeliers for a specified sum, and they were returned in an incomplete state, it was held that an action could not be maintained for what had actually been done.³ So where an attorney covenanted to pay a clerk 2s. for every quire of paper he copied out, the contract was held entire as to each quire, and there could be no recovery for copying any less number of sheets.⁴ The contract of an attorney is an entire one to carry a suit to its termination; and he cannot recover for doing a part of this service and then abandoning the case, unless he is able to put the client in fault.⁵

Where the consideration is in its nature apportionable, as where it is money, and the stipulated service is to be continuous for a considerable period, or consists of a series of distinct acts, and there is no entire sum to be paid for all, nor anything in the contract inconsistent with a demand of payment as the work

¹ *Ritchie v. Atkinson*, 10 East, 295; *More v. Bonnet*, 40 Cal. 251.

² *Stark v. Parker*, 2 Pick. 267; *Olmstead v. Beale*, 19 id. 528; *Davis v. Maxwell*, 12 Met. 286; *Ewing v. Ingram*, 24 N. J. L. 520; *Craumer v. Graham*, 1 Blackf. 406; *Jewell v. Thompson*, 2 Litt. 52.

³ *Sinclair v. Bowles*, 4 Man. & R. 3; 9 B. & C. 94.

⁴ *Needler v. Guest*, Aleyn, 9.

⁵ *Harris v. Osbourn*, 2 Crompt. & M. 629; *Van Sandan v. Brown*, 29 Bing. 402; *Nicholls v. Wilson*, 11 M. & W. 106.

progresses, on part performance there may be a recovery for what is done.¹ Thus, where a shipwright agreed to put a ship into thorough repair, but there was no stipulation as to the time or mode of payment, it was held that the person who so undertook might sue for payment *pro tanto*, when part of the work had been done.² And where a party contracted to carry by canal boat to market three kinds of lumber for different prices, and the contract was silent as to the time of payment, it was not deemed an entire contract; delivery of the whole lumber at market was not deemed a condition precedent to the payment of freight, but it became due and was demandable as fast as the lumber was delivered.³

The question in every case is, whether the intention of the parties was that the compensation should depend upon full performance, and is expressed in the contract. Where such intention would seem contrary to the equity of the case, courts ought to require that it should be clearly expressed before they enforce it.⁴ If an agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed.⁵ And this is more obviously so where the service or other thing to be done consists of distinct periods or parts, and a separate sum is agreed to be paid for each. Thus an agreement was made to deliver straw at the rate of three loads in a fortnight for a specified period, at a stated price per load, and silent as to the time of payment; it was held that the party delivering the straw was entitled to demand payment on the delivery of each load.⁶ But even where the compensation is by the contract to be computed at so much per month, or on some other detail, the intention may be found that the promise shall be deemed entire on one side, based on an entire consideration on the other. Where a plaintiff undertook to cure a flock of sheep and lambs

¹ Taylor v. Laird, 1 H. & N. 266;
Perkins v. Hart, 11 Wheat. 237.

² Roberts v. Havelock, 3 B. & Ad.
404.

³ Sickels v. Pattison, 14 Wend.
257; Ritchie v. Atkinson, 10 East,

295; Robinson v. Green, 3 Met.
159.

⁴ Leonard v. Dyer, 26 Conn. 177.

⁵ Perkins v. Hart, 11 Wheat. 237.

⁶ Withers v. Reynolds, 2 B. & Ad.
882; More v. Bonnet, 40 Cal. 251.

of the scab, at so much per head for the sheep, and so much for the lambs, and not to be paid anything unless he cured all, it was held there could be no recovery for any partial performance of this agreement.¹ So where a party agreed to work ten and a half months to spin yarn at three cents per run, and there was no stipulation as to the time of payment, in an action for spinning eight hundred and forty-five runs at three cents per run, he having worked only a part of the time, it was held that the contract was entire for the whole period of ten and a half months, and performance for the whole period a condition precedent; therefore the action could not be maintained.²

It seems generally to have been considered that a contract of hiring for a year, or a less time, for so much per month, per week or per day, silent as to the time of payment, is entire, and the wages only payable on the services being rendered for the whole time.³ Hubbard, J., speaking of such a contract,⁴ said: "There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part, and payment on the other, and not part performance and full payment for the part performed." The cases are numerous enough and harmonious enough to establish this as the proper construction of this class of contracts; but it is to be observed that this construction is based more upon the policy of the rule than the intention of the parties. The amount earned can be ascertained under the contract from time to time, and in the absence of any promise to pay for the whole service in one sum at the end of the stipulated period, there would seem to be no legal impediment to a demand of instalments of wages as the benefit accrues therefrom; there is a general expectation of such payments, and a need of them.⁵

¹ *Bates v. Hudson*, 6 Dowl. & R. 3.

² *McMillan v. Vanderlip*, 12 John. 165.

³ *Decamp v. Stevens*, 4 Blackf. 24; *Monell v. Burns*, 4 Denio, 121; *Lantry v. Parks*, 8 Cow. 64; *Hansell v. Ereckson*, 28 Ill. 257; *Swanzy v. Moore*, 22 Ill. 63; *Davis v. Maxwell*, 12 Met. 236; *Olmstead v. Beale*, 19

Pick, 528; *Thayer v. Wadsworth*, id. 349; *Winn v. Southgate*, 17 Vt. 355; *Reab v. More*, 19 John. 377; *Larkin v. Buck*, 11 Ohio St. 561, *Thorpe v. White*, 13 John. 53.

⁴ *Davis v. Maxwell*, *supra*.

⁵ See 2 Smith's Lead. C. [*47]. In *Thorpe v. White*, 13 John. 53, it was held that where there is a con-

Where wages are payable by instalments in the ratio of part performance, while the work is in progress, these may be recovered as they fall due, although there is a hiring for a definite term; and if the work is abandoned without serving the full time, there can be no loss of any which is completely earned and due. There can be no recovery for an unfinished wages-period.¹

WHERE EMPLOYER GIVES SERVANT CAUSE TO QUIT, OR WRONGFULLY DISMISSES HIM.—Where the employer prevents the servant from performing his contract, the latter is entitled to recover his wages for the time he has served, whether the contract is entire for a longer period or not, and whether the prevention is by wrongfully discharging him, or by giving him sufficient cause to quit work of his own motion.² The employé is entitled to damages for the wrongful dismissal when discharged without cause before the expiration of the term for which he was employed.³

For the services actually rendered he may recover on a *quantum meruit*, treating the contract as rescinded, on being discharged, or departing for good cause;⁴ or he may sue on the contract of hiring and recover damages, including the wages earned, to the amount of the actual loss sustained.⁵ But he cannot have both remedies. After treating the contract as still

tract of hiring for a definite period, at a certain rate per day, and a part only of the time having elapsed, the parties settle the amount of the wages which had then been earned, and the hirer gives his note to the servant for the amount; in an action on the note, it is no defense that the payee had left the maker's service before the expiration of the time for which he had been originally hired; although, had there been no subsequent modification of the agreement, he could not have recovered wages until he had served the whole period agreed upon.

¹ Cunningham v. Merrell, 10 John. 203; Hamlin v. Race, 78 Ill. 422.

² Gates v. Davenport, 29 Barb. 160;

Bull v. Schuberth, 2 Md. 57; Congregation of Chil. of Israel v. Peres, 2 Cold. 620.

³ Pritchard v. Martin, 27 Miss. 305; Brinkley v. Swicegood, 65 N. C. 626; Adams v. Pugh, 7 Cal. 150; Barker v. Knickerbocker Life Ins. Co. 24 Wis. 630; Prentiss v. Ledyard, 28 id. 131.

⁴ Brinkley v. Swicegood, 65 N. C. 626; Bull v. Schuberth, 2 Md. 57; Given v. Charron, 15 Md. 502.

⁵ Pritchard v. Martin, 27 Miss. 305; Stewart v. Walker, 14 Pa. St. 293; Willoughby v. Thomas, 24 Gratt. 521; Hunt v. Crane, 33 Miss. 669; Walworth v. Pool, 9 Ark. 394; Fowler v. Walker, 25 Tex. 695.

subsisting by an action upon it for damages for a wrongful discharge, he cannot recover in general assumpsit for services actually rendered.¹ And either action may be brought immediately. In the special action, however, there might be a disadvantage in its being brought before the expiration of the term of employment. The full damages for that term cannot be assessed in advance. This was strikingly illustrated in a Wisconsin case. The plaintiff had been employed at an annual salary of \$2,000, to act as superintendent of a lumbering establishment for five years. He was discharged at the end of the first year, and he then brought suit to recover damages in respect to the remaining four years. He had found other employment for one year at a salary of \$1,000, and the trial having taken place while he was performing this engagement, the trial court proceeded on the presumption, as a legal one, that the state of facts existing at the time of the trial would continue through the ensuing years to the end of the contract term, and a verdict of \$4,000 was found in favor of the plaintiff. This verdict was set aside on appeal, on the ground that there could be no such presumption. Cole, J., said: "In any business, the price of labor fluctuates greatly within four years; particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year five hundred dollars, and so on, would it not be unjust to say he should only recover according to the rule adopted by the jury in this case. Or suppose the value of the labor should rise so that he could obtain for his services two thousand or twenty-five hundred dollars a year, what then would be his loss for the failure of the appellant to fulfil his contract? Still further difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? . . . As the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime."²

¹ Goodman v. Pocock, 15 Q. B. 576; Colburn v. Woodworth, 31 Barb. 381. See Watts v. Todd, 1 McMull. 26; Blun v. Holitzer, 53 Ga. 82.

² Gordon v. Brewster, 7 Wis. 355; Sutherland v. Wyer, 67 Me. 64; Wright v. Falkner, 37 Ala. 274; Fowler v. Armour, 24 id. 194; Pritchard

Where the action is not tried until the period of the stipulated service has expired, the plaintiff will be entitled to recover the agreed wages or salary for the whole time, but reduced by the amount which the plaintiff has or might have earned by engaging to any other party during the time of the breach.¹ Where there has been a wrongful discharge of an employé, it is his duty to diligently endeavor to find other employment during the time for which he claims damages from the defendant. This is required because the law discourages idleness, and on the principle that it is the duty of the injured party to reasonably exert himself to prevent or diminish damages arising to himself from the acts of the defendant.² The opportunity to be employed by another will not, however, be presumed, but must be affirmatively shown by the defendant. While the rule here is the same as in other cases, that compensation is limited

v. Martin, 27 Miss. 305. See *Hartland v. General Exchange Bank*, 14 L. T. N. S. 863; *Alfaro v. Davidson*, 40 N. Y. Supr. Ct. 87; *Gifford v. Waters*, 67 N. Y. 80; *Howe Machine Co. v. Bryson*, 44 Iowa, 159; *Lewis v. Atlas Mut. Life Ins. Co.* 61 Mo. 534; *Washburn v. Hubbard*, 6 Lans. 11.

¹*Barker v. Knickerbocker Life Ins. Co.* 24 Wis. 630; *Prentiss v. Ledyard*, 28 id. 131; *Congregation of Child. of Israel v. Peres*, 2 Cold. 620; *Decker v. Hassel*, 26 How. Pr. 528; *Blun v. Holitzer*, 53 Ga. 82; *Fereira v. Sayres*, 5 W. & S. 210; *Alger v. Alger*, 10 S. & R. 235; *McDaniel v. Parks*, 19 Ark. 671; *Whitaker v. Sandifer*, 1 Duv. 261; *Colburn v. Woodworth*, 31 Barb. 381; *Shannon v. Comstock*, 21 Wend. 457; *Byrd v. Byrd*, 4 McCord, 141; *Squitt v. Wright*, 1 Mo. App. 172; *Sprague v. Morgan*, 7 Ala. 952; *Davis v. Ayres*, 9 id. 292; *Fowler v. Armour*, 24 id. 194; *Martin v. Everett*, 11 id. 375; *Ramey v. Holcomb*, 21 id. 567; *Bromley v. School District*, 47 Vt. 381; *Howard v. Daly*, 61 N. Y. 362; *Hendrickson v. Anderson*, 5 Jones' L. 246; *Williams v. Anderson*, 9

Minn. 50; *Horn v. Western L. Assoc.* 22 id. 233; *Walworth v. Pool*, 9 Ark. 394; *Utter v. Chapman*, 38 Cal. 659; *Jaffray v. King*, 34 Md. 217; *Cumberland, etc. R. R. Co. v. Slack*, 45 id. 161; *Costigan v. Mohawk, etc. R. R. Co.* 2 Denio, 609. In *Yerrington v. Greene*, 7 R. I. 589, it was held that the death of the employer, who had retained a clerk and salesman in his business for three years, occurring before the expiration of that term, excused the further performance of the contract, and that no action could be maintained against the administrators of the employer for their refusal longer to employ such clerk.

²*Miller v. Mariners' Church*, 7 Greenlf. 51; *Jones v. Jones*, 4 Md. 609; *Chamberlain v. Morgan*, 68 Pa. St. 163; *Sutherland v. Dyer*, 67 Me. 64; *Howard v. Daly*, 61 N. Y. 362; *Benziger v. Miller*, 50 Ala. 206; *Baker v. Knickerbocker Life Ins. Co.* 24 Wis. 630; *Shannon v. Comstock*, 21 Wend. 457; *Hecksher v. McCrear*, 24 id. 309; *Walworth v. Pool*, 9 Ark. 394; *Polk v. Daly*, 14 Abb. N. S. 156; vol. I, p. 148.

to the actual injury, and this is deemed to be only the difference between the wages stipulated to be paid by the defendant and the amount the plaintiff by diligence can obtain for like service elsewhere; yet the burden is on the defendant to show the latter amount; otherwise the damages will be measured by the salary or wages agreed to be paid.¹ The plaintiff is not required to diminish the damages measured by the agreed wages by engaging in a different business;² nor, it has been held, at a different place.³

It has been supposed that the right to recover at the rate of the stipulated wages rests upon the fact that the service is personal; and therefore during the term the employé keeps or should keep himself in readiness actually to do the stipulated work; and is not required or at liberty to enter into any engagement inconsistent with his duties under the contract sued upon.⁴ Where the party employed stipulated to cause certain services to be performed, and was not expected or required to render them in person, and they were to be performed for a stated period for a stipulated sum, it was held that the contract was assimilated to an agreement for particular work to be performed or materials to be furnished; and that the damages for the employer's breach would be the difference between the cost of the work and the amount agreed to be paid; that the employé was entitled to a pro rata compensation, according to the terms of the contract, for the time he had performed the agreement, and had not been paid; and for the profits which he could have made during the residue of the time it had to run.⁵

In some states it is held that the plaintiff must show the amount of his loss by proving his diligence to get other employment, and what he has been able to realize.⁶

¹ *Costigan v. Mohawk, etc. R. R.* Co. 2 Denio, 609; *Howard v. Daly*, 61 N. Y. 362; *Gillis v. Space*, 63 Barb. 177; *King v. Sturer*, 44 Pa. St. 99; *Chamberlain v. Morgan*, 68 Pa. St. 168. See *Gazette Printing Co. v. Morss*, 60 Ind. 153; *Williams v. Chicago Coal Co.* 60 Ill. 149.

² *Id.* But see *Perry v. Simpson Waterproof Co.* 37 Conn. 520.

³ *Costigan v. Mohawk, etc. R. R.* Co. 2 Denio, 609.

⁴ *Jaffray v. King*, 34 Md. 217.

⁵ *Ramey v. Holcombe*, 21 Ala. 567. See *Shannon v. Comstock*, 21 Wend. 457.

⁶ *Hunt v. Crane*, 33 Miss. 669; *Fowler v. Walker*, 25 Tex. 695; *McDaniel v. Parks*, 19 Ark. 671; *Huntington v. Ogdensburg, etc. R. R. Co.* 33 How. Pr. 416. See *Whitaker v. Sandifer*, 1 Duv. 261; *Willoughby v. Thomas*, 24 Gratt. 521.

The damages recovered are not wages for constructive services; but compensation for being prevented from earning the stipulated wages according to the contract of hiring. If, at the beginning of the period hired for, the employer refuses to take the person employed into his service; or afterwards, before the end of that period, wrongfully discharges him, there is no further duty on his part to be in readiness to perform; or to decline any engagement which would have been incompatible if the other party had kept his agreement.¹ The employer's violation of his contract to employ for a specified time, or for a specified service, has sometimes given a right to other damages than an equivalent for the direct wages or salary thus prevented from being earned. Thus, the defendant, residing in New Hampshire, by letter proposed to the plaintiff, who was residing in Minnesota, that if he would come back to New Boston he might move into the defendant's house; that defendant would give the plaintiff and his wife a year's board; and he might carry on the defendant's farm on any terms he might elect; the defendant, accepting the offer, moved back, and an arrangement for carrying on the farm was made. On a breach of this contract by the defendant refusing to allow the plaintiff to enter upon its performance, it was held that, in assessing the damages, the jury might take into consideration the expenses of such removal; which were treated as part of the consideration paid by the plaintiff, and distinctly contemplated by the parties.² It is material that such expenses be incurred in consequence of the contract, and be contemplated when the contract is made.³

¹Howard v. Daly, 61 N. Y. 362; Moody v. Leverich, 14 Abb. N. S. 145; Sutherland v. Dyer, 67 Me. 64; 2 Parsons on Cont. 40 and note. See Shaw v. Republic Ins. Co. 69 N. Y. 286; Beckwith v. Baldwin, 12 Ala. 720; also Williams v. Anderson, 9 Minn. 50.

²Woodbury v. Jones, 44 N. H. 206.

³Benziger v. Miller, 50 Ala. 206. In Johnson v. Arnold, 2 Cush. 46, the defendant agreed with plaintiff, who lived in Massachusetts, to furnish goods to a certain amount to

stock a store in Indiana for two years. The plaintiff was to take charge of the business, and to have half of the net profits. It was held, that, in estimating the damages, it was competent for the arbitrators, to whom the case was referred, to allow the plaintiff compensation for the loss of time and expenses of removing his family to and from the agreed place of business, instead of the profits he would probably realize if the business had continued. The breach was the failure of defendant

Where the defendant, doing business in Massachusetts, wrote to the plaintiff in the Sandwich Islands: "I am ready to offer you a foreman's situation at these works as soon as you may get here; pay, \$1,500 a year;" and the plaintiff accepted the offer and came, but the defendant refused to employ him, it was held that he was not entitled to recover as part of his damages either his expenses in coming from the Sandwich Islands, or compensation for the time consumed in the journey.¹

LIABILITY OF EMPLOYÉ FOR VIOLATION OF HIS CONTRACT.—The employé is liable to the employer for violation of his contract of service; and damages therefor may not only be recovered by action, but may be deducted or recouped from the sums due for service in actions for their recovery.² Where an overseer, employed at a stipulated sum per annum, was sick a part of the time, so as to unfit him for active duty, but he was permitted to remain in the service of his employer up to the end of the year, he was held entitled to pro rata compensation; and it was declared as a general principle, that if the employer had been injured by the imperfect performance of the overseer's undertaking, damages adequate to the injury should be recouped.³ And this kind of de-

to fulfil his agreement, thus preventing the plaintiff from continuing the business.

¹ *Noble v. Ames Manuf'g Co.* 112 Mass. 492. See *Peters v. Whitney*, 23 Barb. 24; *Woodbury v. Brazier*, 48 Me. 302.

² *Still v. Hall*, 20 Wend. 51; *Harper v. Ray*, 27 Miss. 622; *Runyon v. Nichols*, 24 John. 547; *Dunlap v. Hand*, 26 Miss. 460; *Doan v. Warren*, 4 U. C. C. P. 423; *Peter v. Craig*, 6 Dana, 307; *Manhall v. Hann*, 17 N. J. L. 425; *Forman v. Miller*, 5 McLean, 218; *Swift v. Harriman*, 30 Vt. 607; *Peters v. Whitney*, 23 Barb. 24. See sec. on Recoupment and Counterclaim. See contra, *N. & R. Turnpike Co. v. Harris*, 8 Humph. 558.

³ *Hunter v. Waldron*, 7 Ala. 753; *Jones v. Dyer*, 16 id. 221; *McLean*

v. Miller, 12 id. 643; *McCracken v. Hare*, 2 Spears, 256; *Farnsworth v. Garrard*, 1 Camp. 38. *Manhall v. Hann*, 17 N. J. L. 243. In this case it appeared that H engaged to M as a glass blower, with a specification of his services, duties and compensation; it was also stipulated that for every wilful neglect or refusal to blow, flatten or do other work customary, etc., the person so neglecting or refusing should pay M the sum of ten dollars. In an action for services, it was held competent for the defendant to show that the services had not been performed in the manner agreed on, and that these penal sums being in the nature of liquidated damages, might be set off against the plaintiff's claim. See *Spalding v. Vandercook*, 2 Wend. 431.

fense may be made for unfaithful service against wages in a proceeding to enforce a lien.¹

In an action by the father for the services of his sons, on an answer that they had been engaged for a specific time, and a breach of the contract, it was held that the defendant had a right to show the damages from such a breach to reduce the recovery.² So, in an action for work and labor against a manufacturing company, it appearing that the plaintiff was subject to a regulation of the company requiring all persons in their employ to give four weeks' notice of their intention to leave the service, and had departed without the required notice, it was held that the defendants were entitled to a deduction from the plaintiff's claim of the damages they had sustained by reason of the plaintiff's breach of the contract.³

In an action by a factor against his principal to recover a general balance, the defendant was allowed to prove in mitigation of damages that the plaintiff had orders to sell the goods consigned immediately, and that they might have been sold, in compliance with such order, for more than sufficient to put the plaintiff in funds to the amount of his shipments and all costs and charges, and it was held that such a defense would be a bar to all commissions, interest, storage, and other charges, caused by such negligence and breach of orders.⁴

According to the weight of American authority, the employer may obtain, by way of recoupment, damages estimated by the same standard or measure as by an action for breach of the servant's contract, whether direct or consequential.⁵ In an action for the breach of a contract to work on a farm, evidence of damage accruing to the plaintiff's crops in consequence of the defendant's leaving his service is inadmissible, the damage being too remote.⁶ The employer may set up as a ground of recoupment not only want of diligence or skill, but even the torts of the person employed which involve a breach of duty in his employment. In an action brought upon a promissory

¹ Ward v. Wilson, 3 Mich. 1.

² Lowen v. Crossman, 8 Iowa, 325.

³ Hunt v. Otis Co. 4 Met. 464.

⁴ Dodge v. Tileston, 12 Pick. 328;

Montrion v. Jeffrys, 2 C. & P. 113.

⁵ Railroad Co. v. Smith, 21 Wall.

255; Lufburrow v. Henderson, 30

Ga. 482; Ward v. Fellers, 3 Mich.

281; vol. I, p. 297.

⁶ Peters v. Whitney, 23 Barb. 24.

note given for work done by the plaintiff for the defendants. the defense was permitted, by way of recoupment, that while the plaintiff was in the defendants' employ, as their servant, they were possessed of drawings, plans, models and patterns of steam engines, etc., which had names, numbers and marks inscribed on them, so as to identify them; and that the plaintiff, contrary to his duty as such servant, destroyed the drawings and plans, and obliterated the names, numbers and marks of the plans, models and patterns. The damages, however, were restricted to compensation, and it was held that nothing could be allowed on account of the malice with which the wrong was done.¹

The omission to set up the defense of recoupment was held in one case in England to be a bar to an action for the same matter;² but that is not the law in this country. Here matter of recoupment which constitutes a cross claim for which a separate suit could be brought, may be used as a defense or not at the election of the defendant. But if set up in a plea or notice, and the defense offered on the trial, the judgment will be a bar, even though the defense be disallowed.³

¹ *Allaire Works v. Guion*, 10 Barb. 55; *Brigham v. Hawley*, 17 Ill. 38; *Lee v. Clements*, 48 Ga. 128; *Satchwell v. Williams*, 40 Conn. 371; *Fowler v. Payne*, 49 Miss. 32; *Conger*

v. Fincher, 28 Ill. 347; *Wilder v. Stanley*, 49 Vt. 105.

² *Kist v. Atkinson*, 2 Camp. 63.

³ *Fabricotti v. Launitz*, 3 Sandf. 743; *McLane v. Miller*, 12 Ala. 643; vol. I, p. 298.

CHAPTER VI.

CONTRACTS FOR PARTICULAR WORKS.

SECTION 1.

EMPLOYER AGAINST CONTRACTOR.

Nature of the contract— Compensation for actual loss the measure of damages— Includes new work to replace or cure defects in contractor's— Not excused by accidental destruction of work— Not answerable for merit of plan furnished— Works contracted for a particular purpose— Damages for delay— Consequential damages for defective work.

NATURE OF THE CONTRACT.— Contracts of this sort contemplate, not service by particular persons as the chief object, but the accomplishment of certain results, by work, or work and material, as the making of a carriage or the erection of a building. The labor and materials are but means or instrumentalities of the contractor, and at his discretion, except as they are prescribed, as they often are, to insure, with more certainty, the required product. Such contracts are fulfilled by any service or means, in the absence of stipulations on that subject, if the end stipulated for is attained.

COMPENSATION FOR ACTUAL LOSS THE MEASURE OF DAMAGES.— The rules for the assessment of damages, being based on the principle of compensation, are closely analogous to those which apply to executory contracts for the sale of personal property. If there is a total breach by the contractor, only nominal damages can be recovered where the thing to be done or produced would be of no value to the employer, or if damage is merely possible or conjectural.¹ Thus, the plaintiff leased to the defendant certain premises, naming no term, and reserving no rent, the lessee covenanting to sink an oil well on the premises, of a certain depth, by a certain day, and to pay a certain price per cord for the wood standing on the lot; a right of re-entry was reserved on breach of the covenant. The defendant failing

¹ Adams Express Co. v. Egbert, 36 Pa. St. 360.

to sink the well, the court, on consideration of the improbability of injury to the lessor, held that only nominal damages could be recovered.¹ The court say: "The measure of damages is to be sought in the contract made by the parties; and where the amount of compensation is not fixed by the contract, the natural approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of damages. Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff if the contract is broken. So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages, if the defendant omitted to perform the contract. In these and like cases, it is easily seen that actual pecuniary loss has been sustained in consequence of the default of the defendant. But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although it could be seen that the performance would have not benefited, but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defense to an action by the employer for the breach of the contract to show that the act to be done, or the erection to be made, would injure the land or impair its value. The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value. A man may do what he will with his own, having due regard to the rights of others, and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant who has been so employed and paid for building it, to say that his own performance would not be beneficial to the plaintiff. . . . The contract on his (the defendant's) part to dig the well, . . . if performed, could result in no benefit to the lessor, except in the possible contingency that after the well was dug, the default of the defendant in paying for the standing timber

¹ Chamberlain v. Parker, 45 N. Y. 569.

on the premises, according to his undertaking in the lease, might enable them to re-enter on the premises. The whole production of the well, if oil should be found, would belong to the defendant for all time, unless the possible ground of forfeiture should occur, just suggested. If this contingency happened, it might be delayed until the supply of oil in the well was exhausted, and the possession of the well had become of no value. The loss or gain in sinking a well was wholly the defendant's. It may be conjectured that the lessor had in view some advantage to other property in the vicinity, from the prosecution of work of exploration by the defendant. There are no facts shown authorizing this inference, and such a ground of damage, if averred, would be speculative and conjectural, and could furnish no satisfactory basis for a recovery. The defendant was not paid for digging a well for the plaintiff on his premises. The well, when dug, would be upon the land of the defendant, and its product would be his. It is idle to say, and the law does not require it to be said, in face of the obvious facts, that the lessors have been damaged to the extent of the cost of digging the well, by the defendant's default. . . . It is not probable that any authority can be found precisely in point; but the rule which has been held by the English courts in several cases, to the effect that in an action of covenant by lessor against lessee for non-repair of the demised premises, under an unexpired lease, the proper measure of damages is not the amount required to put the premises in repair, but the amount in which the reversion is injured by the premises being out of repair, tends to support the conclusion that the rule of damages adopted in this case [the amount it would cost to bore such a well] was erroneous."¹

The employer is entitled to such damages as will be equivalent to the benefit which he would derive from having a full performance of the contract. Where a defendant had agreed to build a house for the plaintiff, for which the plaintiff covenanted to convey to the defendant a house and lot; for a neglect to build the house, the measure of damages was held to

¹ Doe v. Rowland, 9 C. & P. 734; v. Lamb, 14 M. & W. 412; Payne v. Smith v. Peat, 9 Exch. 161; Turner Haine, 16 M. & W. 541.

be the difference in value between the house and lot to be conveyed, and the house to be built.¹

A plaintiff agreed to let the defendants have all the pine timber on his land that was suitable for good lumber; and the defendants agreed to saw the same into lumber and sell it as soon as they could; to saw no other lumber until it was done, and to pay the plaintiff annually in money one-fifth of the gross proceeds of the lumber sold and collected by them. For breach of this contract by the defendants' failing and refusing to saw all the timber on the plaintiff's land, it was held but one action would lie, in which, although the time of performance may not have elapsed, the plaintiff would be entitled to recover damages for the continued and prospective failure of performance, to be assessed on the basis of the value at the time of the breach. And the measure of his recovery would be the profits which would have accrued to him from the defendants' performance of the contract, to be ascertained by deducting the value of the timber left unsawed from one-fifth of the value of the lumber which it would have made.²

INCLUDES NEW WORK TO REPLACE OR CURE DEFECTS IN CONTRACTOR'S.—The measure of damages for breach of contract for putting up particular work, as, for instance, a steam boiler, by doing the work unskilfully or with defective material, is the difference between its value in its defective condition, and what its value would be if completed in compliance with the contract. This latter sum may be more than the contract price, or it may be less, but it is obviously the proper standard by which to measure the damages of the employer, because a boiler so completed is exactly what he is entitled to;³ then the contractor obtains also just what his defective work is worth. Substantially the same measure of compensation is allowed when the rule is stated, as it sometimes is, that the contractor is liable to damages for the reasonable cost and

¹ Laraway v. Perkins, 10 N. Y. 371.

³ White v. Brockway, 40 Mich.

² Fail v. McKee, 36 Ala. 61; 209. See Lamareaux v. Rolfe, 36 Whalon v. Aldrich, 8 Minn. 346; N. H. 33; Colton v. Good, 11 U. C. Q. McGovern v. Lewis, 56 Pa. St. 231; B. 153.

Houser v. Pearce, 13 Kan. 104.

expense, after his default of procuring to be done any specific work which he undertook to do, and has not done; or to cure defects in his work, when that is a prudent and practicable method of removing objections.¹

In an action on a bond to save the plaintiff harmless from liens on a certain building, and to build it by a specified day, and there was a breach in both particulars, the expenditures incurred by the plaintiff in completing the house, and in discharging liens, made necessary by the defendant's default, constitute the measure of damages.² And where a bond had been given, conditioned to do certain work in clearing land, for breach of this condition the cost of performing the stipulated work was held to be recoverable.³

The plaintiff, an engineer, was employed by one S to repair a steam threshing machine, the work to be finished before harvest, or by the end of July, or by the beginning of August. It being found necessary to get a new fire-box made, the plaintiff, in June, contracted with the defendants to make one for him for 12*l.*, which was paid, and they agreed to make it in about a fortnight. The fire-box was not sent to the plaintiff until the 3d of September, when it was found to be useless. The plaintiff was then obliged to employ another person to make another fire-box, for which he had to pay 20*l.* The threshing engine, in consequence of these delays, not being ready until November, S brought an action against the plaintiff to recover damages in respect of his breach of contract, claiming 50*l.*, but he ultimately settled the matter by accepting 20*l.* and costs, making together 25*l.* 17*s.* It did not appear that the plaintiff, when he gave the defendants the order for the fire-box, communicated to them the nature of his contract with S; or that they were made

¹ Weed v. Draper, 104 Mass. 28; Pittsburgh Coal Co. v. Foster, 59 Pa. St. 365; Brown v. Foster, 57 id. 165; Cutler v. Close, 5 C. & P. 337; Thornton v. Place, 1 M. & Rob. 318; Houser v. Pearce, 13 Kan. 104; Mayne on Dam. 97; Clifford v. Richardson, 18 Vt. 620; Dreen v. White, 5 Iowa, 266; Goddard v. Barnard, 16 Gray, 205.

In Walker v. Ellis, 1 Sneed (Tenn.), 515, it was held that expenses incurred in attempting to get the articles elsewhere, that the defendant had contracted to make, were not recoverable as damages.

² Hirt v. Hahn, 61 Mo. 496.

³ Sullivan v. Reardon, 5 Ark. 140.

aware of it until after there had been a complete breach of their contract. It was held that the plaintiff was entitled to recover the sum he had paid the defendants for the fire-box, and the further sum of \$L., which the plaintiff had to pay in procuring another fire-box; but that the compensation paid by the plaintiff to S was not such a damage as might fairly and reasonably be considered either as arising naturally from the defendants' breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.¹

¹ *Portman v. Middleton*, 4 C. B. N. S. 322; *Hadley v. Baxendale*, 9 Exch. 341. See *Smeed v. Foord*, 1 E. & E. 602; *Collins v. Baumgartner*, 52 Pa. St. 461; *Hawley v. Belden*, 1 Conn. 93; *Fisher v. Goebel*, 40 Mo. 475. *Missouri, K. & T. Ry Co. v. City of Fort Scott*, 15 Kan. 435, is an interesting case on this subject of damages. The city of Fort Scott subscribed \$75,000 of the stock in the Missouri, Kansas & Texas Railway Co., and issued \$75,000 of the bonds of the city in payment therefor. In pursuance of the same contract, the city also issued \$25,000 of its bonds to the company for the purchase of right of way through the city, and for grounds for machine shops, engine houses, etc. In consideration thereof, the company promised that, within six months, it would construct a railroad from Sedalia, Mo., through Fort Scott, to connect with the line running from Junction City in a southeasterly direction; that it would make this a great through line to the Indian Territory and Texas; and construct no other line of road south of Fort Scott in the same direction; that it would make Fort Scott the end of a division, and erect engine houses and machine shops at or near that place, before doing so at any other point southwest of Sedalia, on the through line

of its road. The company completed this contract, except that it did not make Fort Scott the end of a division, and did not erect an engine house and machine shops there, but erected them at Parsons. In an action by the city for the breach of this contract, testimony was admitted against the objection on behalf of the company of a diminution of population, for the purpose of showing a decline in the price of real estate in the city during a period subsequent to the construction of the road, and prior to the building of the shops and engine house at Parsons, and ending after the fact of such building became known at Fort Scott. This testimony was held, on appeal, inadmissible, because speculative; it only tended to show a loss of uncertain profits expected to accrue from the performance of the contract; and also because such depreciation and depopulation might have resulted from other causes as well as from the breach of the contract.

The court suggested that recovery might be measured by the consideration, as though the company's undertaking were a condition precedent or subsequent; and, in the latter case, the city is entitled to recover back the amount paid, with interest; or, where the unperformed condition is

In such cases the employer is generally entitled to measure his damages by what the necessary expense would be to procure to be done the work which the contractor neglected to do, whether it is done or not; for the same reason that a vendee in an executory contract for the sale of goods need not, in fact, purchase the goods he was entitled to receive from the vendor, in order to have his damages computed on the basis of what they would cost him at the time of the breach.

NOT EXCUSED BY ACCIDENTAL DESTRUCTION OF WORK.—Where the undertaking is to make some article, or even to build and complete a house on the employer's land, the contractor is not exempt from liability as for a breach of his contract, though he has been prevented from performing it solely by some accident or casualty, by which his work before completion has been destroyed without any fault on his part; as where the building he has contracted to erect has fallen in consequence of some latent defect in the soil impairing the foundation;¹ or by lightning or fire.² But it is otherwise where a person agrees to expend labor upon a specified subject, the property of another, as to shoe his horse or slate his dwelling house, and the horse dies, or the house is destroyed by fire;³ or where a building is agreed to be erected

the erection of buildings or other improvements within the city, the value thereof for the purposes of taxation might be treated as the measure of damages. Brewer, J., said: "The city, by the non-performance of the condition, loses the value of the improvement for the purpose of taxation, and this is a direct pecuniary loss, and one susceptible of determination with reasonable certainty. The average rates of taxation in the past—there being no exceptional causes of temporary taxation—may fairly be accepted as the rates of the future. The value of the improvement being shown, the amount of the annual tax is a simple mathematical calculation. This annual tax may be considered in the nature of an an-

nuity whose present value is susceptible of exact determination by the ordinary tables."

¹ *Dermott v. Jones*, 2 Wall. 1; *School Trustees v. Bennett*, 27 N. J. L. 513.

² *Tompkins v. Dudley*, 25 N. Y. 272; *Adams v. Nichols*, 19 Pick. 275; *Brunsbys v. Smith*, 3 Ala. 123; *School District v. Dauchy*, 25 Conn. 530; *Bacon v. Cobb*, 45 Ill. 47; *Shanks v. Griffin*, 14 B. Mon. 153. See *Clark v. Franklin*, 7 Leigh, 1.

³ *Lord v. Wheeler*, 1 Gray, 282; *Cleary v. Sohler*, 120 Mass. 210; *Wells v. Culnan*, 107 id. 514; *Niblo v. Binsse*, 1 Keyes, 476; *Schwartz v. Saunders*, 46 Ill. 18; *Sinnott v. Mullin*, 82 Pa. St. 333. See *Wilson v. Knott*, 3 Humph. 273. In *Hollis v. Chapman*, 36 Tex. 1, the plaintiff, a

carpenter, undertook to furnish material and do the wood work necessary to finish defendant's brick building, and to turn over the building, complete, by a given day for a specified gross sum. When the plaintiff had nearly completed the work the building was destroyed by fire without his fault. Ogden, J.: "Under our blended system of legal jurisprudence, and especially under our peculiar system of pleading, common counts in declarations, as technically known at common law, have never been considered as necessary or essential. But while most of the fictions and many of the forms recognized and prescribed in the books have in this state been abolished, yet the substance of every count and form is as requisite under our practice as under any other system; every action being a special action on the particular case, the petition should set forth a full and clear statement of the cause of action 'without ambiguity or contradiction, and also a clear statement of the relief sought.' The case was therefore stated so as to exhibit the particulars, and might appear to be an action on the real transaction."

The court continued after disposing of some preliminary questions: "It may be admitted that by the civil and common law, where there is a specific and positive contract absolutely to do an entire piece of work, or job, subject to no conditions either expressed or implied, and to be paid for only when the work is completed according to the contract, such contract is not apportionable, and the contractor is not entitled to any pay until the work is completed. But where there is a condition, or when the contract is dependent upon the execution of another contract, or where the payment is not specifically deferred to

the completion of the undertaking, in such a case the contract is apportionable; and in case of an accident rendering the completion of the contract impossible, the contractor is entitled to *pro rata* pay for his work; and this appears to have been the rule recognized by the best authorities. Story on Bailments, 363.

"In the case at bar, the appellant Hollis agreed to furnish the material and do the carpenter work on two brick buildings then in process of erection for a specified sum. He further agreed to turn the building over furnished complete, and to do the work with all possible dispatch. This agreement could not possibly have been an entire, independent contract, for it was dependent on many circumstances, such as the erection of the walls to receive the carpenters' work, etc., etc. And we think the weight of authority authorizes us in deciding that on the event of the accidental destruction of the building by fire, he was entitled to recover the value of his labor and materials expended on the building. *Clark v. Franklin*, 7 Leigh, 1; *Hayward v. Leonard*, 7 Pick. 181; Story's Eq. 362." The court puts the recovery on the "*apportionability*" of the contract, and the authority of Texas cases to that quality of such contracts. *Baird v. Ratcliff*, 10 Tex. 81; *Hillyard v. Crabtree*, 11 Tex. 284; *Gonzales College v. McHugh*, 21 Tex. 256; and *Carroll v. Welch*, 26 Tex. 147.

But neither of the cases cited bears any analogy to the case decided. They do not decide any question as to the contract being apportionable: they were contracts not apportionable, and the workman recovered on the *quantum meruit*, based on the benefit received by the other party from the part performance.

on the employer's lands, and is destroyed by any cause against which he was bound to provide.¹

Here in this case of *Hollis v. Chapman*, the right to recover may be maintained, but certainly not on the ground that the contract was apportionable; but because the risk of such destruction was properly on the other party, and the complete performance of the contract was prevented by the destruction. The provision for payment on completion should be deemed to be on the implied condition that the building be not destroyed. Where there is no express stipulation as to the time of payment the contract is apportionable, and it may be demanded as the work progresses, as stated in the quotation contained in the opinion from *Appleby v. Myers*, L. R. 2 C. P. 651: "It is quite true that materials worked by one into the property of another become part of the property, and therefore, generally, in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not completed. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as in the case of *Roberts v. Havelock*, 3 B. & Ad. 404, or because in consequence of a fire he could not go on with it, as in *Menetone v. Athewes*, 3 Burr. 1592."

¹ In *Sinnott v. Mullin*, *supra*, the plaintiff contracted to build four houses for defendant, and failed to complete the same by reason of the falling of a stone wall on another part of the defendant's lot, whereby the buildings which were nearly finished were destroyed. In an action to recover for work done and

materials furnished, it was contended for the plaintiff that it was the duty of the defendant to provide a place for the erection of the houses under the contract that was reasonably secure and safe, and that the contract itself implied an undertaking on his part that the place chosen was free from danger; and the court say, by Woodward, J., that this point should have been affirmed "subject to the qualification that the plaintiff was barred of all right to a verdict, if he had taken upon himself the risk of danger from the condition of the defendant's property. The wall was on the ground on which the houses were to be built, but on a part of it over which he had no rights. The case stands as if the injury had resulted from the fall of a structure on adjoining property belonging to the defendant. The relations of the parties were created by the contract, and for the purposes of this question they do not essentially differ from the relations towards each other which exist between master and servant in the ordinary contract for the employment of labor. The plaintiff had the right to require that the place where his work was to be done should, in the language of the point, 'be reasonably safe and secure,' and such a place it was the duty of the defendant to afford. Against manifest and patent danger, the plaintiff would be held to take his chance. It was for the jury to say whether the danger was manifest and patent here. Was this wall reasonably safe and secure? If not, were the defects in its construction latent? And were they such defects as the defendant was bound to

CONTRACTOR NOT ANSWERABLE FOR MERIT OF PLANS FURNISHED HIM.—Where the builder constructs the building in a workmanlike manner, according to the plans referred to in the contract, or, in case of any material deviation, where it is made with the consent of the other party, such builder will be under no responsibility for its subsequent destruction, whether caused by its own inherent weakness, or from the violence of storms. When his undertaking is simply to do the work with reasonable skill after the designs furnished by architects, he is not a guarantor of the strength of the edifice when finished, or its capacity to withstand the violence of the winds.¹

WORKS CONTRACTED FOR A PARTICULAR PURPOSE.—Where a contract is made for the manufacture of a specific article, or for specific work, for a particular use or purpose, mutually contemplated by the parties, damages for a breach will be assessed with such scope as to afford compensation for any in-

know? Without entering on the perilous regions of implied warranty, it is sufficient for the purposes of justice to assert, that it is the duty of the employer to advise the employé of all defects which the employé ought to know; and that the employer, if he fail in performing his duty, is liable to the employé for injury the latter may thereby receive. Wharton on Negligence, § 209. Further than this, the employer is not only liable for injury sustained from extraneous latent dangers, if he withhold from the employé notice of them (*Baxter v. Roberts*, 44 Cal. 187), but he is liable also for injury caused by defects of which the employer may not have been cognizant, but which it was his duty to have searched for and remedied. Whart. on Neg. § 211. Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to

guard against and prevent any defects from which increased and unnecessary danger can occur. The risks necessarily involved in the service must not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had the right to expect it would be kept. *Cockburn, C. J.*, in *Clark v. Halmes*, 7 H. & N. 937. There was evidence that the attention of the plaintiff was called to the condition of the wall while negotiations for the contract were going on. But whether he satisfied himself as to its safety, and assumed the risk which his work in its neighborhood might involve, or relied on the assurance of the defendant, and concluded his contract in ignorance of latent dangers, it was the province of the jury to decide."

¹ *Clark v. Pope*, 70 Ill. 123.

jury which may naturally and proximately result in respect to that object, whether that injury be in gains prevented, or losses sustained. Where the grantee of a right of way through the grantor's land covenanted to maintain a gate placed at the terminus, and failed to replace it after it had been destroyed, the cost of rebuilding the gate was held not the measure of damages, but the actual injury sustained by the covenantee upon his land; it was a continuing covenant, and intended for the protection of the farm.¹

The plaintiff sued on a note given for work done and materials furnished in the construction of a sheet iron and galvanized iron roof upon a livery stable belonging to defendant. The defendant pleaded that the roof was constructed in a negligent, unskilful and unworkmanlike manner, and of inferior materials, in consequence whereof it leaked, and defendant's hay was wet and his wall damaged, and he was put to inconvenience in the necessary removal of his stock from one portion of his stable to another; for which he claimed damages. The court held these damages were not too remote; that the defendant was entitled to recover to the extent of such damage, if he had no knowledge of such defects; but if he knew of the defects in time to protect himself at a trifling expense, or by reasonable exertions, he could recover nothing for damages suffered in consequence of such leakage.²

DAMAGES FOR DELAY.—For delay in the performance of particular work, damages will be recoverable according to the injury. Where it was paid for in advance, and no special damage was shown, interest on the amount paid for it was allowed as damages.³ For delay in constructing and putting up machinery in a flouring mill, the employer was held entitled to recover such sum as the mill would have earned during the time of such delay, taking the fair ordinary earnings of the mill, less the expense of running the same; but it should appear that the party claiming such damages was in a condition to work his mill by having grain to grind.⁴

¹ *Beach v. Crain*, 2 Comst. 86;
Buck v. Rogers, 39 Ind. 222.

² *Haysler v. Owen*, 61 Mo. 270;
vol. 1, p. 148.

³ *Edwards v. Sanborn*, 6 Mich. 348.

⁴ *Davis v. Talcott*, 14 Barb. 611.
But see *Griffin v. Colver*, 16 N. Y.
489.

Where a person undertakes to erect a building, or to put a mill or machinery in operation, he ought to be holden to indemnify the other party against the loss of the use of the building, mill or machinery, after the expiration of the time for performing the contract; and if it was defectively made, he should indemnify him for such loss of the use during the time necessarily spent in repairing it and putting it in order.¹ In such cases, the rental value during the delay is the general rule.²

¹ *Griffin v. Colver*, 61 N. Y. 489.

² *Ruff v. Rinaldo*, 55 N. Y. 664; *Freeman v. Clute*, 3 Barb. 424; *Wagner v. Corkhill*, 40 Barb. 175; *Cassidy v. Lafevre*, 45 N. Y. 562; *Willey v. Fredericks*, 10 Gray, 357; *Brown v. Foster*, 51 Pa. St. 165; *Hexter v. Knox*, 63 N. Y. 561; *Winne v. Kelly*, 34 Iowa, 339; *Clifford v. Richardson*, 18 Vt. 620; *Rogers v. Bemus*, 69 Pa. St. 432; *Fisher v. Grebel*, 40 Mo. 475; *St. Louis, etc. R. R. Co. v. Lurton*, 72 Ill. 118; *Sperry v. Fanning*, 80 id. 371; *Boyle v. Reeder*, 1 Ired. 607; *Korf v. Lull*, 70 Ill. 420. See *Fort v. Orndoff*, 7 Heisk. 107, and *Fletcher v. Tayleur*, 17 C. B. 21.

In *Friedland v. McNeil*, 33 Mich. 40, it was held that delay in the completion of a contract to do only the mason work of a church will not authorize the recovery of the loss of pew rents as damages; such loss cannot be said to be the necessary natural or probable result of such delay, since the completion of the contract does not put the building in condition for the renting of pews. Cooley, J., said: "A large amount of other work would still remain to be done, and large expenditures to be made, with which this contractor would have no concern whatever; and the building might never be put in condition for renting of pews, and yet he be in no way responsible. It can never be said that the loss of rents is a neces-

sary, natural or probable result of a particular default, when, had no default occurred, the necessary conditions to rent would still be wanting, and might never be supplied. Any claim against this contractor for damages, resulting from loss of rents, must assume that the trustees had the ability and inclination to proceed at once to complete the church, and were only delayed by the contractor's default." See *Wagner v. Corkhill*, 40 Barb. 175, which was an action to recover for work done upon a building contract; the defense was, that the building was to be completed by a specified time, and was not completed within that time; it was held that, if it appears that the defendant had the building erected for his own use, and it was completed afterwards with his knowledge and without objection from him; that he was kept out of the use by the plaintiff's failure to perform on his part, the law will presume that he was damaged, and will give him, by way of compensation, what such use was worth, for the time he was deprived of it; so, if he was, by such failure, prevented from renting it.

But if it was proved that he did not contemplate using the building himself, or in his own business, but that he caused it to be built for the purpose of renting to others; and that he did not, in fact, lose an op-

The loss of the use is the direct and inevitable result of the breach. The value of that use the injured party is entitled to recover; and it should be assessed on the same principle as the value of personal property which a vendor fails to deliver in fulfilment of a contract of sale. Where no special use, enhancing the value to the employer or vendee, was mutually

portunity of renting it, by reason of the plaintiff's delay, he cannot recoup against the plaintiff's claim the rents and profits of the building from the time when it should have been to the time when it was completed.

Blanchard v. Ely, 21 Wend. 342, is an authority opposed to the allowance of profits consisting of the earnings of a steamboat.

A boat was delayed in its trips in consequence of being defectively constructed. The judge at the trial directed the jury not to allow as damages for delays the profits which might have been made from the trips that were lost; in respect to which Cowen, J., said: "No common law authority was cited at the bar, one way or the other, having any direct application to the measure of damages in such a case as this, nor am I aware that any exists." The direction of the judge below was approved. See *Coweta Falls M. Co. v. Rogers*, 19 Ga. 416.

In *Griffin v. Colver*, 16 N. Y. 489, Selden, J., said: "It is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for the estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of *Blanchard v. Ely* must have proceeded upon

this ground, and can, I apprehend, be supported upon no other. . . .

"In . . . (that case) . . . the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. . . .

"Had the defendants in the case of *Blanchard v. Ely* taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiff's contract.

"The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., etc., are not only susceptible of more exact and definite proof, but, in a majority of cases, would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of busi-

contemplated when the contract was made, only the market or general value is recoverable. The enhanced value is not rejected merely because it is uncertain; it may be quite certain, as where an existing contract for renting or resale provides for it; still it is rejected, because it is not a gain mutually contemplated to accrue from performance of the contract, nor the loss of it as an injury mutually contemplated to result from a breach. In the absence of such notice, the defaulting party is only liable for the general rental value,—that which would be received in the multitude of instances.¹ The damages, to be recoverable, must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain in their nature and in respect to the cause from which they proceed.²

This rule of rental value for delay, however, has been departed from where the delay would be indefinitely continuous, as where the execution of the contract has been abandoned; then the difference between the value of the property as it would be if the contract had been performed, and as it is in consequence of the failure to fulfil it. Where a railroad company was bound to build and maintain perpetually a side-track in front of certain lots owned by the covenantor, on a breach of this covenant by abandonment, after the track had been laid, it was held that the proper measure of damages was the difference in value

ness, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt, than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair estimate of the rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an

average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly, if not quite, as certain as the market value of commodities at a particular time and place." See *Western Gravel Road v. Cox*, 39 Ind. 260. Compare *Sikes v. Paine*, 10 Ired. 280, and *Beverly v. Williams*, 4 Dev. & Batt. 236.

¹ *Hadley v. Baxendale*, 9 Exch. 341. Compare *Waters v. Towers*, 8 id. 401; *Fox v. Harding*, 7 Cush. 501.

² *Griffin v. Colver*, 16 N. Y. 489.

of the plaintiff's lots with the side-track operated and not operated, together with interest thereon from the abandonment up to the date of trial, or not, at the discretion of the jury. This rule, say the court, "renders the ascertainment of the damages easy, certain and final; and limits them to what would surely be within the contemplation of the parties. Whereas, the annual rental value is more speculative and uncertain; is liable to great fluctuations from causes not within the scope of the contemplation of the parties, nor indeed within the range of their anticipations; besides, if the damages are apportionable, the measure of difference in annual rent would result in a multiplicity of suits; or, if not apportionable, then the result must be purely speculative (as to future rents), or the plaintiff be barred by one recovery from any other."¹

The damages allowable for delay or entire neglect to perform may include any actual loss which happens naturally and in the ordinary course of things, where the circumstances from which the damages so result may be supposed to have been mutually contemplated by the parties when they made the contract. Where there is a delay in the erection of machinery, or a subsequent interruption to repair it when found defective, or in consequence of neglect to do some other work necessary to its operation, there may be a loss from the idleness of dependent machinery, and from the idleness of laborers.² So, also, such a breach of contract for particular work may result in the destruction of other property, or be detrimental to it, as by failure in building a fence or shelter. Compensation for such losses, when they occur notwithstanding due vigilance and exertion of the injured party to prevent or reduce the injury, may be recovered.³ But the contractor is not responsible where the injury is suffered, not directly from the delay or refusal to perform, but from some extraordinary or fortuitous cause having no relation to this breach of contract, except that it was contemporaneous.⁴

¹ *Amsden v. Dubuque & Sioux City R. R. Co.* 28 Iowa, 542.

² *Boyle v. Reeder*, 1 Ired. 607; *Saluda Manuf. Co. v. Pennington*, 2 Spears, 735; *Colton v. Good*, 11 U. C. Q. B. 153. See *Johnson v. Matthews*, 5 Kan. 118; *Walker v. Ellis*, 1 Sneed, 515.

³ *Buck v. Rodgers*, 39 Ind. 292; *Haysler v. Owen*, 61 Mo. 270. See *Houser v. Pearce*, 13 Kan. 104.

⁴ *Ashe v. De Rassett*, 5 Jones' L. 299; *Daniels v. Ballantine*, 23 Ohio St. 532; *Mich. Cent. R. R. Co. v. Burrows*, 33 Mich. 6; *Denney v. N. Y. Cent. R. R. Co.* 13 Gray, 481.

A plaintiff had made a contract with defendants to tow two boat-loads of coal by the first rise in the river; the defendant refused to tow them when the rise came; the boats remaining at their moorings were struck by a raft set afloat by a sudden rise in the river, and sunk, without any neglect of the plaintiff. It was held that the defendants were not liable for the loss of the boats and coal. The contract was to tow the boats from Pittsburg to Oil City, and the plaintiff was unable to procure other tows. And it was also held that the jury had been correctly charged that there was a breach of contract which rendered the defendants liable for the difference in the value of coal at Pittsburg and Oil City at the time the boats would have arrived there if the contract had been performed, less the cost of getting it there; and that the same rule applied to the boats.¹ In *Calkins v. Baumgardner*,² the court, for failure to boat coal according to contract, held the employer was entitled to recover not only the difference in the price of freight, but also for any trouble and expense incurred in procuring other boats; and if all his efforts were ineffectual, and his supply was insufficient and much less than it would have been had the contract been fulfilled by the defendant, whereby, in consequence of deficient supply and increased price of coal, he sustained loss and injury in his business, such loss would be another element of damages for which claim might be made; and that if he incurred expenses on account of his expected receipt of this coal under the contract, which he would not otherwise have encountered, these might also be added in making up the amount of damages.³

In *Pittsburg Coal Co. v. Foster*,⁴ the plaintiff contracted to furnish the defendant, on the first of February, an engine to draw coal cars on a track of unusual width; the engine was not delivered until May; the defendant gave evidence that an en-

Compare *Parmalee v. Wilks*, 22 Barb. 539.

¹ *McGovern v. Lewis*, 56 Pa. St. 231.

² 52 Pa. St. 461.

³ In *Smith v. Smith*, 45 Vt. 433, an item of alleged damage from defendant's failure to complete a highway within the stipulated time

was a deduction the plaintiff was obliged to make in the rent of a house on the line; held, conjectural and remote. Another item, for being necessitated, by the same breach, to build a winter road for his use, was allowed. See *Walrath v. Whittekind*, 26 Kan. 482.

⁴ 59 Pa. St. 365.

gine for such track could not be hired, and that he had to transport his coal by horses; held, that evidence of the difference of cost of transportation between horse power and by the engine during the plaintiff's delay was admissible on the question of damages. On this subject Agnew, J., said: "The true inquiry which arose under these circumstances was, whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively within the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendant's track by the first of February. The damages ordinarily recoverable are those necessarily following the breach, which the party guilty of the breach must be presumed to know would be the probable consequence of his failure.¹ This rule is well expressed by Strong, J., in *Adams Express Co. v. Egbert*:² They must be a proximate consequence of the breach, not merely remote or possible. There is no measure of losses of the latter kind. 'But, on the other hand,' he remarks, 'the loss of profits or advantages, which must have resulted from a fulfilment of the contract, may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made.'³ . . .

"That the loss in this case was immediate, and the necessary consequence of non-fulfilment, is obvious. . . The direct consequence of not getting it (the engine) was, that they were obliged to continue transporting the coal as before, by horses and mules, until the engine was put there." But the offer to prove that the defendants could have mined and hauled one-third more coal with the engine than by the old mode, and to show the profits thence arising, was held too remote. "While it is obvious that F must have known that the failure would compel the company to continue in the use of the old mode of transportation, it cannot be fairly inferred that they would know that the possession of the engine would enable the company to mine

¹ 2 Greenlf. Ev. § 253.

² 56 Pa. St. 364.

³ Fassler v. Love, 48 Pa. St. 410-11;

Fleming v. Pick, id. 312-13; *Hadley v. Baxendale*, 26 Eng. L. & E. 398.

more coal, and also to haul more. This is a possible or remote consequence, but not a necessary one.”¹

CONSEQUENTIAL DAMAGE FOR DEFECTIVE WORK.—A party was employed to dress two pairs of burr mill stones in a mill at sixteen dollars a pair. There was no special contract as to the

¹In *Hazleton Coal Co. v. Buck Mountain Coal Co.* 57 Pa. St. 301, the latter company covenanted to furnish for transportation over the other company's railroad all the coal they should mine to the amount of 1,000,000 tons, guarantying that the quantity should not be less than 600,000 tons in eight years. The Hazleton Coal Co. covenanted to furnish transportation accordingly. The jury were charged, and it was held properly charged: “If the jury should find that the defendants failed to transport the coal offered to them under the contract, the damages would be the loss the plaintiffs suffered on the coal thus offered for transportation. This loss would be the difference between the cost of mining, preparing and transporting the coal to Penn Haven, and the price it would have brought there. This is the direct and immediate consequence of the defendants' breach of their contract. The defendants had the exclusive control of the transportation. The plaintiffs had no other route to Penn Haven to avail themselves of and to reduce the loss to the difference in cost of transportation. The plaintiffs being confined to this route, and yet denied it by the defendants' refusal to transport, the direct loss is the difference between the cost of the coal at Penn Haven and the price it would bring there, or, in other words, the profits. I say Penn Haven, because it is the terminus of the Hazleton road, and of the ship-

ment under the contract. But the jury will remember . . . that the actual shipments did not end there, the coal being carried by mining arrangements with other roads to markets further off, and there was probably no general market for the sale of coal at Penn Haven. The jury would, therefore, have a right to take the price of the coal in the market of sale, and to deduct from this the cost of transportation from Penn Haven, and the expense of putting the coal in the market, in order to find a fair price at Penn Haven, and from this deduct the cost of mining and preparing the coal and of transporting it to Penn Haven.

“But besides the coal actually mined and ready for transportation, if the defendants refused to furnish sufficient transportation, and thereby compelled the plaintiffs to desist from mining up to their reasonable productive capacity, this would be an injury for which damages may be allowed. If, by the defendants' breach of their contract and failure to furnish the necessary transportation, the plaintiffs became unable to mine, because of the blocking up of their mines, so that the production must cease from a want of cars to take it away, the defendants cannot set up the consequences of their own breach as a defense, and resist a recovery, because the coal could not be mined and offered to them. The injury of the plaintiffs would be the loss they

profits to be derived by the mill. On these facts it was held that there was no error in saying to the jury that they should estimate the immediate loss and not the remote character of the work, nor in reference to any circumstances attending it; nor was there evidence of any special facts brought to the employé's notice to show that his contract was made in view of the

suffered on the reasonable amount of coal they were, in the course of mining, able, ready and willing to mine, and offer for transportation, had they not been prevented by the defendants' acts from doing so. To the extent of this breach of the defendants in failing to furnish cars beyond the number they did furnish, if so found by the jury, the plaintiffs would be entitled to a fair and reasonable sum in damages — what the jury can properly find, on all the evidence, as a compensation for the reasonable amount of coal they were thus prevented from mining." See *Laurent v. Vaughn*, 30 Vt. 90; *Haven v. Wakefield*, 39 Ill. 509; *Taylor v. Maguire*, 13 Mo. 517. In *Prosser v. Jones*, 41 Iowa, 674, J agreed to thresh the grain of P whenever the latter should require it to be done, but failed to comply with the terms of the agreement. This appears to be the naked statement as to the contract; but it was alleged that when notice was given from time to time to defendants, they promised to do the work, and the plaintiff, at their request, piled up and stacked a large part of his grain without binding it; that the rest was standing in shocks in the field, and defendants directed that it should be left in that condition, to be threshed out in the shock; that the plaintiff, relying on these promises and directions, did not stack all of his grain; that he could not procure help to stack it; that he attempted to procure others to thresh

it, but could not, for the reason that there was no other machine in the neighborhood, and that by reason of these matters plaintiff's wheat was greatly injured, for which he demanded damages. The claim for these special or consequential damages was stricken out of the petition, because the plaintiff sought to recover on the original contract and not on the subsequent promises; and because the latter added nothing to his rights upon the contract. Beck, J., said: "The defendants undertook to do the threshing within a time fixed after notice to them. The contract cannot be interpreted so that it may be inferred that damages of this kind were within the contemplation of the parties when it was executed. The law does not hold one liable for all the consequences that may follow the breach of his contract; if it were so, his liability would be without a limit, for it would continue as far as the consequences of his act could be traced. But the law wisely limits liability to the direct and immediate effects of the breach of a contract. The losses and expenses set up in the petition are not of this character. They resulted remotely from the fact that defendants failed to thresh the grain, and are not the natural and proximate consequences of the defendants' breach of the contract. Such damages are not recoverable." According to the general principles on which consequential damages are allowed, and the

consequences, such as the loss of custom.¹ Agnew, J., followed this ruling by these observations: "A very small part of the machinery of a mill or factory may be so essential to its running, that the want of it will stop operations until this part be mended or replaced, causing a large loss by suspension. But who has ever supposed that the blacksmith, millwright, or mechanic who undertakes to repair or replace it, and whose compensation may be a few dollars, or even a few cents, is, by his implied contract to do his work in a workmanlike manner, to be held liable for the large losses of the mill being idle? But few men could be found to work at a risk so great for a compensation so inadequate. But where by the terms of a special contract, or the facts brought into view at the time of his employment, the attention of the party is called to the fact that the risk is to be his, and he enters upon the duty with this consequence in his mind, he may be held to another measure of compensation."

If a person engages in the business of searching public records, examining titles to real estate, and making abstracts thereof, for compensation, the law implies that he assumes to possess the requisite knowledge and skill, and that he undertakes to use due and ordinary care in the performance of his duty; and for failure in either of these respects, resulting in damages, the party injured is entitled to recover. Where a party was employed to examine the records and make an abstract of the title to real estate, and he omitted to note the fact of a judgment and sale of the land for taxes, of which the employer who purchased the premises was ignorant until the time for redeeming had expired, and was consequently obliged to pay out money to remove the cloud upon his title, it was held he was entitled to recover of the person making the abstract the sum so paid to remove the cloud.²

general current of decisions, the damages here sought to be recovered were not remote. They were manifestly within the contemplation of the parties. The case of *Smeed v. Foord*, 1 E. & E. 602, is a case in which such losses were held recov-

erable for breach of contract to furnish a threshing machine to thresh grain in the field. See *Houser v. Pearse*, 13 Kan. 104.

¹ *Fleming v. Beck*, 48 Pa. St. 309.

² *Chase v. Heany*, 70 Ill. 263.

SECTION 2.

CONTRACTOR AGAINST EMPLOYER.

Demands for extra work — Payment recoverable on part performance of a severable contract — Demands for part performance of an entire contract — Certificate of architect, engineer, etc. — Measure of damages against employer who stops the work without contractor's fault.

The contract price, if there is one, or, if not, the reasonable value of what has been done, is the measure of recovery, where the contract for particular work has been performed. And the measure of recovery which the contract provides is not affected by payments made by strangers to the contract.¹

DEMANDS FOR EXTRA WORK.—Demands for extra work are a common and prominent feature of the claims made under or in connection with contracts of this sort. The principal contest in respect to such demands is whether the work in question is extra, and whether it has been done under such circumstances that the employer is responsible for it. The employer cannot be made a debtor for such work without his consent. He should be informed that the work or material, for which he is sought to be made liable, before it was done or furnished, would constitute a claim of this nature, and knowing this, it should be established as a fact that the contractor had his authority for it.²

¹ Miller v. Ward, 2 Conn. 494.

² Springdale Cemetery Asso. v. Smith, 32 Ill. 252; Western Union R. R. Co. v. Smith, 75 Ill. 496; Chicago & Gt. E. Ry. Co. v. Vosburg, 45 Ill. 311; Hart v. Norton, 1 McCord, 22; Wilmot v. Smith, 3 C. & P. 353; Jones v. Woodbury, 11 B. Mon. 169; Miller v. McCaffrey, 9 Pa. St. 245; Loveland v. King, 1 M. & Rob. 60; Bartholomew v. Jackson, 20 John. 28; Dobson v. Hudson, 1 C. B. N. S. 652; 26 L. J. C. P. 153; Bailey v. Woods, 17 N. H. 335; Wildey v. School District, 25 Mich. 419; Wheeden v. Fiske, 50 N. H. 125; 2 Par. on Cont. 57; 2 Add. on Cont.

§ 870; Turner v. Grand Rapids, 20 Mich. 390; Hollenshead v. Maclier, 13 Wend. 276; Goldsmith v. Hand, 26 Ohio St. 101; Hasbrouck v. Milwaukee, 21 Wis. 217; Matter of Wood, 51 Barb. 275; Slusser v. Burlington, 47 Iowa, 300. The case of Jones v. Woodbury, supra, is a very instructive one on this subject. Jones employed Woodbury, a carpenter, to build for him a framed house, the different apartments and dimensions of which were exhibited in a ground plan, and Woodbury agreed to do the work for \$600 or \$650, to be paid by the conveyance of a certain lot estimated at \$800;

the excess to be paid in carpenter work. The house was in fact built by Woodbury and finished with the most costly work, and he made a claim therefor of upwards of \$3,000. Marshall, C. J., said: "Such an extraordinary excess above the contract can only be justified by the fact to be established with reasonable certainty. 1st. That in the execution of the work there were corresponding departures from the original design, either in the plan and dimensions of the house, and the quantity of materials and labor, or in the quality of the materials and finish, or style of work, or in some or all of these particulars; and 2d. That these departures were directed by the employer, or assented to by him understandingly, with a knowledge, or at least with reason to believe, that they would greatly increase the cost of the building to him. When the builder has undertaken the erection of a house for another for a specified price, without specification as to the manner or style of the work, it is his duty, when he proposes to do any part of it in a more costly style than would be justified by the agreed price, to apprise the employer of the difference in the cost. The employer may not know, and is not presumed to know, the gradations of price pertaining to the different modes or styles of finish. He relies and has a right to rely upon the undertaker of the work for information on this subject. And the latter having undertaken to complete the house for a fixed price cannot increase it *ab libitum*, merely on the ground that he was allowed to proceed with and complete the work according to his own judgment or taste, or that certain modes of work proposed by him pleased the fancy and met the ap-

probation of the employer. *Prima facie*, the employer had a right to suppose, unless apprised of the contrary, that every proposition as to different portions of the work is made under the contract for the whole, and is intended merely to present to him a choice of modes within that contract. And to get rid of this inference, the undertaker must show either that he apprised the employer that his proposition was a departure from the original design and contract, and would be attended with increased cost, or that it was of such a character as necessarily to carry this information to him. And as to costly work done in his absence and in a manner not previously approved by him, it is not sufficient to show that upon his return he was pleased with its appearance, and did not order it to be removed or pulled down.

"The general principle applicable to the case of a special contract for erecting a house, when in the progress of the work there have been alterations and additions not originally contemplated nor expressly provided for, seems to be that so far as the work can be traced under the original contract, it shall be paid for under that contract, and that the residue which cannot be brought within the contract shall be paid for as if there were no contract. But the safety of employers, and the good faith proper to be observed in all cases, requires that this rule should be so applied as not to violate the principles above stated; and they seem to indicate further, that extra work, either in quantity or quality, unless done under an express agreement, or at least a statement of the price, should not be charged for at a greater rate in reference to the measure and value price of such

work, than the contract price bears to the measure and value price of the work contracted to be done. So that if the contract price was a fourth or a fifth less than the price estimated by measure and value, the extra work should not be estimated at more than three-fourths or four-fifths of its price according to measure and value. . . . And we do not perceive how the verdict as to the amount can be sustained on any other principle than that of allowing for the work without reference to the contract price.

"The principal witness for the plaintiff, who was employed as his foreman in erecting the house, and who professes to be 'an *architect*,' and says that none but an 'architect' can understand the merits and value of the work done, referring to its earliest stage and certainly to a period when no extra work was done, states that the ground plan being before the parties, he was requested to draw a front view of the house, not departing from the ground plan, on which, he says, was written, in the handwriting of the defendant, the statement that the work was to be done in a neat, plain and workmanlike manner; that he accordingly drew a front view, preserving the dimensions of the ground plan; that the plaintiff exhibited this drawing to the defendant, as presenting '*the front view of his house*,' without any intimation that it was a departure from the original plan or contract, or would require an increased expenditure, and that the defendant was much pleased with it.

"This drawing presents a very handsome front, and was, as we understand, substantially followed, though perhaps with some additional ornaments in the erection and com-

pletion of the building. But we cannot say, from the copy of it which accompanies the record, that it furnishes any information or definite idea as to the precise nature of the workmanship, or as to the cost, or that its approval by the defendant necessarily implied that he intended, or was willing to give up his original contract, in order to have such a house as was represented in this drawing, without regard to the cost.

"The witness seemed to consider the approbation or adoption of this drawing as the plan for the front of the house, as a total departure from the original plan, in the style and manner of workmanship, and said that the presentation of it as the front view of the house, under the circumstances above stated, did not imply the intention or impose an obligation on the part of the undertaker to construct the house according to this plan at the contract price, and that he knew of no custom among carpenters to that effect. One or two other witnesses concurred with him as to not knowing of such a custom. But several of the defendant's witnesses deposed that they understood such to be the custom. And the defendant's counsel asked for an instruction to the effect that if the jury believed the front view was presented to the defendant under the circumstances above stated, and that there was such a custom as that stated by defendant's witnesses, the law presumed the intention and understanding of the parties to have been in accordance with such custom; which instruction the court refused to give. And this refusal is complained of as erroneous.

"Independently of any custom on the subject, reason and good faith

indicate the inference as a matter of fact, that when the undertaker of a house by special contract, presents to his employer a drawing of his house, without intimating that it differs from the one which he expected and intended to build under the contract, the employer has a right to infer that it presents the plan of his house as it is to be built under the contract, unless there be some circumstance in the plan itself, or attending its presentation, by which he is or should be clearly apprised that this is not to be expected. The existence of a custom in conformity with this natural and just inference might raise it to the dignity of a presumption of law. But the instruction, in the form in which it was asked, and without qualification, would have excluded from the jury the inquiry, whether by the plan itself or some other circumstance, the defendant was not apprised that a house built according to that plan must cost more than the contract price; and whether, in fact, he did not approve or adopt the plan with that expectation. It might also have prevented the jury from giving due weight to subsequent facts or acts of the defendant, tending to prove that he was aware, in the progress of the work, that there was a departure from the original design and estimate, which must considerably enhance the cost, and that with this knowledge he approved of or directed these departures, and therefore should, to that extent, be bound to pay their reasonable value. We cannot say, therefore, that the court erred in refusing this instruction as asked. The law requires and intends to enforce good faith on both sides of such a transaction; and will no more hold the builder to the contract

price, when by the authority or consent of the employer he has made alterations or additions which the latter knew would greatly increase the cost, than it will hold the employer to the full 'measure and value price' for such departures from the plan originally contemplated as he may have been drawn into the approval of, without knowing that they were departures, or without knowing that they would add materially to the cost. It was not necessary, however, that he should have actually or expressly directed the departures from the original plan. If he knowingly and understandingly assented or approved them when proposed, and thus caused additional expense and labor, not comprised in the original design and estimate, he made himself justly liable to pay an additional sum therefor. . . .

"But on the other hand, it is not sufficient that he approved or assented to certain additions or alterations or departures proposed for his acceptance, and in some instances, evidently with the design of captivating his fancy. He must, in order to make him liable on the ground of such approval or consent, have been apprised either by direct communication of the fact, or by the nature of the proposition, that the work proposed would be attended with increased cost to him."

In *Dubois v. Delaware & H. Canal*, 13 Wend. 334, the plaintiff had entered into an agreement for excavating a section of a canal; he was to receive a given price per cubic yard for ordinary excavation, but no price was stated for hardpan. During the progress of the work a large quantity of the latter was excavated, a fair remuneration for which would exceed the highest

It is also essential that the work which is claimed for as extra, should be extra; for if it was in truth covered by the contract, there would be no ground for asking compensation for it beyond that provided in the contract; and a promise to pay for it would be without consideration.¹ For all work done beyond the contract under prior direction or subsequent consent there is an undoubted liability.² But the mere fact of the defendant having assented to certain alterations is not sufficient to make him liable to pay for them as extra work not covered by the contract. But sometimes the nature of the alterations will be such that he cannot fail to be aware that they will increase the expense, and cannot therefore be done for the contract price.³

The rate of compensation for extra work and materials should doubtless be that fixed by the contract so far as it can be made to apply; otherwise it will be determined as though no contract had been made.⁴ The contract may require deviations and extra work to be ordered in writing, still it will not place the employer under any disability to contract afterwards orally for new work, or for changes of the contract.⁵ But may operate to restrict the authority of an architect or other agent of the employer.⁶

PAYMENT RECOVERABLE ON PART PERFORMANCE OF SEVERABLE CONTRACT.—Where a special contract has been entered into and the contractor has not fully performed his part of it, his right

price specified in the contract for any species of work. While the work was being done, the parties treated the excavation of hard-pan as not included in the contract; and after it was completed the employer conceded that the contractor was entitled to compensation for such work beyond the price fixed for ordinary excavation; it was *held* that the contractor was entitled to recover on a quantum meruit, and so much as he could show the work was worth.

¹*Sweany v. Hunter*, 1 Murph. 181.

²*Fletcher v. Gillespie*, 3 Bing. 637;

Thornton v. Place, 1 M. & Rob. 218.

³*Lovelock v. King*, 1 M. & Rob. 60.

⁴*Wheeden v. Fiske*, 50 N. H. 125; *Thornton v. Place*, 1 M. & Rob. 218; *Fletcher v. Gillespie*, 3 Bing. 637; *Ellis v. Hamlin*, 3 Taunt. 52; *Goldsmith v. Hand*, 26 Ohio St. 101; *Hollinshead v. Mactier*, 13 Wend. 276; *Jones v. Woodbury*, 11 B. Mon. 169. See *McCormick v. Connolly*, 2 Bay, 401; *Wright v. Wright*, 1 Litt. 179.

⁵*Escott v. White*, 10 Bush, 169.

⁶*Thayer v. Vermont Cent. R. R. Co.* 24 Vt. 440; *Herrick v. Belknap*, 27 id. 673.

of recovery will depend on the nature of the contract, as to being entire or severable; the cause of short or imperfect performance on his part, and the conduct of the employer. If the contract is severable, so that for some part performance, an instalment or portion of the compensation is expressly or by construction made payable before the residue of the work is done, an action may be brought therefor when due, and the right to recover it will not be otherwise affected by subsequent defaults or infractions of the contract, than by reduction by recoupment or counterclaim.¹

A more liberal rule in some states is adopted than in others in the construction of contracts, to render them severable. Thus it has been laid down in Vermont, that where one party contracts to do a job of work, and another to pay a stipulated price for it; and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and full performance not a condition precedent to any right of action, unless it be so expressly stipulated, or is inferable by strong implication. In such cases, the party performing in part will recover the stipulated price *pro tanto*, deducting damages sustained by the other party from the failure to perform the entire contract.² And so in Virginia and Texas, it has been ruled that covenants, though dependent in form, will be construed as mutual and independent when it is necessary to effect justice between the parties. A party having covenanted to do two things, one of which he has done, will be allowed to maintain an action for the part done, as upon an independent covenant.³ And in North Carolina it was held that where a

¹Goldsmith v. Hand, 26 Ohio St. 101; Sickels v. Pattison, 14 Wend. 257; Lord v. Belknap, 1 Cush. 279; Crabtree v. Hagenbaugh, 25 Ill. 233; Recker v. Fairbanks, 40 Me. 43; Snook v. Fries, 19 Barb. 313. But see Cox v. Western P. R. R. Co. 44 Cal. 18.

²Booth v. Tyson, 15 Vt. 515. See Snook v. Fries, 19 Barb. 313; Recker v. Fairbanks, 20 Me. 43.

³Todd v. Summers, 2 Gratt. 167. In this case a parol agreement was

made in April, 1838, by which S agreed to sell to T his interest in a piece of land. T, in return, agreed to make 50 M. good staves for S (but S to saw the timber) by Christmas, and 25 M. more by May following. T had been put in possession of the land and continued to hold it. S was held entitled to recover for T's failure to make the staves, though S had not sawed the timber, T having the right to recoup damages against S for his failure to saw

contract for the performance of work is divided into three separate and distinct parts, there is no reason why the plaintiff should not recover for work done on the first two, according to the contract, though the third part was not finished.¹ So, in Georgia, it was held that if A contract with B to repair different parts of a machine and two frames for spindles, the one not being dependent at all for its use upon the completion of the other, and the former is repaired and received by the owner, he cannot make the failure to deliver the others an excuse for not paying for that which is finished and accepted.² In Pennsylvania also a like view has been declared. "A mutual or dependent covenant, which goes but to a part of the condition on both sides, and whose breach may be compensated in damages, is to be treated exactly as if it were separate and independent. Its non-performance will not necessarily bar the entire right of the plaintiff. So, too, a covenant which is in form entire, but in truth embraces a variety of acts, more or less essential to the whole performance, may be so discharged as to sustain an averment of performance, though a literal compliance cannot be alleged."³ But in New York, in a late case, a contract had been made by the plaintiff to make for the defendant three or four models of a mowing machine, without delay; no price had been agreed on, nor when the machines should be paid for. It was held that the contract was entire for three models, and the plaintiff having made and delivered one only, was not entitled to recover for it, although it had been accepted.⁴ And in *Stephens v. Beard*⁵ it was held that, where one party agreed to saw by a given time 300 M. feet of boards at a stipulated price per M., and failed to saw the whole quantity, that though he had sawed 144 M. feet, which had been received by the other party, compensation for sawing this quantity could not be set off against the claim for damages for the omission to saw the residue. Sutherland, J., said: "The

the timber. *Carroll v. Welch*, 26 Tex. 147.

¹ *Brewer v. Tyson*, 5 Jones' L. 173.

² *Coweta Falls M. Co. v. Rogers*, 19 Ga. 416.

³ *Danville Bridge Co. v. Pomroy*,

15 Pa. St. 159; *Chambers v. Jaynes*, 4 id. 39.

⁴ *Sharps v. Johnson*, 41 How. Pr. 400. See *Cunningham v. Jones*, 4 Abb. 433.

⁵ 4 Wend. 604.

plaintiff claims damages for the neglect or refusal of the defendant to saw the 156 M. feet of boards, parcel of the 300 M. which he had agreed to saw. The defendant admits the violation of his contract, and that so far as the 156 M. are concerned, the plaintiff had sustained damage by his non-performance, at least to the amount of \$100. But then he says I performed the residue of the contract, and sawed for him 144 M. feet, my services in doing which were worth to him \$2 per M. feet by his own admission; and, in estimating his damage, in consequence, for my partial non-performance, the benefit received by him for my partial performance is to be taken into account, and is to be deducted. This reasoning must be fallacious. The fallacy, I apprehend, is this: The action, though in form it alleges an entire breach of the contract, is in fact for the omission of the defendant to saw the 156 M. feet, and the claim of damage is confined to that. The defendant has the benefit of his partial performance; having been accepted by the plaintiff, it is *pro tanto* an answer to his action, and leaving the parties in the same condition as though the contract had been to saw 156 M. feet, and had been entirely unperformed. And the defendant cannot in this indirect manner recover for services which by the established principles of law he cannot recover for directly." The following case seems to be decided on the opposite view of the law. The plaintiff voluntarily and without cause abandoned a contract to build a house for the defendant before its completion and sued to recover the contract price. The defendant presented in offset a claim for work done and expense incurred by himself to complete the job, and for damages for the non-completion thereof by the plaintiff, and this set-off or counterclaim was allowed by the referee. And it was held that thereby the defendant received an equivalent for the performance of the contract, and that the plaintiff was, therefore entitled to recover the contract price.¹ A contract which was entire when made may be severed by the subsequent acts of the parties; payments made, or sums promised absolutely, on the contract, may be retained or collected, though the work has not been done which by the contract was a condition precedent.²

¹ Austin v. Austin, 47 Vt. 311.

See Meyer v. Hallock, 2 Robt.

² Walker v. Millard, 29 N. Y. 375. 284.

In *Hayden v. The Inhabitants of Madison*,¹ a contract to build a road was let, one-half the price to be paid when the road was completed, and the other half a year afterwards. The larger part of the work was done, but it was not completed. The employer made the first payment with a knowledge of these facts. In a suit brought afterwards for the contract price and on a *quantum meruit* for as much as was done, it was held that making the payment was a waiver of the terms of the special contract, and the plaintiff was entitled to recover on the latter count; and that to ascertain the sum to be recovered the contract price should be taken as the true value of the whole work agreed to be done.

In *Williams v. Colby*,² it was held that the defendant, having voluntarily made payments after the completion of the work contracted for, could recover nothing back, though it was found that the work was imperfectly done; that such payments were a waiver of all claims for damages to the extent of such payments.

In Texas it was held that where a party employs a mechanic to do a certain job of work and pays him in advance, and the work is suspended for want of materials, or other cause, at the instance, or by the default of the employer, the right of the mechanic is not to retain the full price, but to reconvene for the damages actually sustained by the failure of the employer to perform his part of the contract.³

DEMANDS FOR PART PERFORMANCE OF AN ENTIRE CONTRACT.—If a contract which is entire, after part performance, is rescinded by the mutual consent and act of the parties as to the residue; or the further performance is prevented by law or the act of God, without the fault of either party, the contractor may recover on a *quantum meruit* for what he has done.⁴ In

¹ 7 Greenlf. 76.

² 44 Vt. 40.

³ *Hood v. Raines*, 19 Tex. 400. See *Hansbrough v. Peck*, 5 Wall. 497; *Wells v. Selwood*, 61 Barb. 238.

⁴ *Hall v. Ripley*, 10 Pa. St. 231; *Hoagland v. Moore*, 2 Blackf. 167; *Algeo v. Algeo*, 10 S. & R. 235; *Moulton v. Trask*, 9 Met. 577; *Mel-*

ville v. De Wolf, 82 E. C. L. 844; *Bannister v. Reed*, 6 Ill. 100; *Wright v. Haskell*, 45 Me. 492; *Canada v. Canada*, 6 Cush. 18; *Webster v. Enfield*, 10 Ill. 298; *Selby v. Hutchinson*, 9 id. 319; *Leonard v. Dyer*, 26 Conn. 177; *Green v. Haley*, 5 R. I. 260; *Derby v. Johnson*, 21 Vt. 17.

such case, neither party is in fault, and therefore is not responsible to the other for failing to fulfil the entire contract. In a recovery on a *quantum meruit* there is an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has done; he recovers such part of the entire compensation as is equal to the part he has performed of the entire contract.

It often occurs that a partial rescission results from deviation from the original plan and contract, made by deliberate and explicit direction of the employer, or with his consent or acquiescence, and by such departures other work is substituted, with other prices agreed to or implied. In such cases, the omission of the particular work excluded by the substitution is not a violation, but dispensed with by modification of the contract, and may involve a reasonable, but indefinite extension of time. The contractor may then be entitled to the contract price, with such increase or subject to such diminution, as is produced by the change of plan, recoverable on a *quantum meruit*.¹

The action may be brought on the contract when the contractor can show that he has substantially performed his part, except as he can allege and prove the legal excuse of being prevented by the employer, by the act of God, or the law; but not otherwise.² It would be illogical and contrary to the case stated

¹Goldsmith v. Hand, 26 Ohio St. 100; Delaware & H. Canal Co. v. Dubois, 15 Wend. 87; Wheeden v. Fiske, 50 N. H. 125; Bailey v. Woods, 17 id. 365; Hart v. Lauman, 29 Barb. 410; De Boom v. Priestly, 1 Cal. 206; Wright v. Wright, 1 Litt. 179; Morford v. Master, 3 J. J. Marsh. 688; Allen v. McNew, 8 Humph. 46.

²In Smith v. Gagerty, 4 Barb. 614, Strong, J., discusses the meaning of a *substantial* compliance with the contract. He says: "No builder ever does or can comply with every minute requisition; a brick, a stone, a nail, a shingle, or board, may have some slight defect which might have been almost, and perhaps entirely imperceptible, until it had been fixed

in its place, and it had become impossible to remove it; or it may happen that a minute portion of mortar, among a large mass, may not have been mixed precisely in the required proportions, and the difficulty may not be discovered until it is too late to change it. Such things will constantly occur, unless men should become more perfect in their powers of perception and discrimination than they are at present. If there is an honest effort to perform the contract according to the letter, and it is substantially fulfilled, the builder should be entitled to receive the reward of his labor, although he may not (as the architect employed in this case certified) have in every instance complied

to allow a recovery except upon proof of performance of the precedent condition. To recover for part performance, on any other explanation or excuse for not having fully executed the contract, requires a different declaration, a *quantum meruit* count. Nor can general assumpsit be maintained for work done under a special contract which is still unperformed and not rescinded; the principle is, that where there is an express promise, none can be implied.¹ This principle is generally followed and strictly enforced where the special contract has been intentionally or fraudulently violated or abandoned by the con-

with its terms 'literally in every punctilio.' A substantial compliance, without any intentional variation, should in all cases be considered as a full performance of a condition, whether precedent or subsequent." See *Estep v. Fenton*, 66 Ill. 467; *Taylor v. Beck*, 13 Ill. 376.

In *Crane v. Knubel*, 61 N. Y. 645, it was held that where, by the terms of a contract, the performance of certain specified work is a condition precedent to payment, a failure upon the part of the contractor to perform in any particular, if wilful and without excuse, will prevent a recovery for the work done. In such case the comparative extent of the default will not be inquired into. H and the defendant entered into a contract under seal, by which H contracted to do the carpenter work on two buildings for defendant; an instalment was to be paid H when a certain specified part of the work was done. He gave the plaintiff an order on the defendant, to be paid when the work was done; the defendant accepted it accordingly. Before the completion of the work so specified, H abandoned the contract. Defendant thereafter, on presentation of the order, promised to pay it. The order was not for the whole amount of the instalment,

and the residue was more than sufficient to pay for the completion of the work. In an action to recover the amount of the order, it was held that, the promise being without consideration, the performance of the condition precedent was not thereby waived; nor was the defendant estopped from alleging non-performance, and the plaintiff could not maintain his action.

In *Smith v. Brady*, 17 N. Y. 173, it appeared that the work sued for on the special contract had not been quite performed; that it would cost a little over \$200 to complete it. The court held the contract not substantially fulfilled, intimating that a substantial performance only ignored those defects which were such trifles as the law did not notice; one member of the court, however, advanced the opinion that a substantial compliance with the contract might have been certified. See *Chambers v. Jaynes*, 4 Pa. St. 39; *Cornell v. Vanartsdolen*, id. 364.

¹ *Jennings v. Camp*, 13 John. 94; *Lawrence v. Simons*, 4 Barb. 354; *Raymond v. Bearnard*, 12 John. 274; *McMillan v. Vanderlip*, 12 John. 165; *Chambers v. King*, 8 Mo. 517; *Shepard v. Palmer*, 6 Conn. 94; *Dermott v. Jones*, 2 Wall. 1; *Clark v. Smith*, 14 John. 326; *Cutler v. Powell*, 2 Smith's Lead. Cas. 17 et seq.

tractor.¹ An exception has been admitted and recovery for part performance allowed on a *quantum meruit*, where the employer, notwithstanding a failure to fulfil in point of time, has permitted the contractor, without objection, to proceed with the work;² or knowing of the breach by delay or imperfect work, has voluntarily appropriated it and derived a benefit from it.³ If the builder has done a large and valuable part of the work he undertook, but yet has failed to complete the whole, or any specific part, within the time limited by his contract, the other party, when that time arrives, has the option of abandoning

¹ *Dermott v. Jones*, 2 Wall. 1; *Sinclair v. Tallmage*, 35 Barb. 602; *Smith v. Gurgerty*, 4 id. 614; *Gleason v. Smith*, 9 Cush. 484; *Gilman v. Hall*, 11 Vt. 510; *Snow v. Ware*, 13 Met. 42; *Walker v. Orange*, 16 Gray, 193; *Veazie v. Bangor*, 51 Me. 509; *Merrill v. Ithaca, etc. R. R. Co.* 16 Wend. 582.

² *Phillips, etc. Const. Co. v. Seymour*, 91 U. S. 646; *Gallagher v. Nichols*, 16 Abb. N. S. 337; *Sinclair v. Tallmage*, 35 Barb. 602; *Merrill v. Ithaca, etc. R. R. Co.* 16 Wend. 586; *Ladue v. Seymour*, 24 id. 60; *Van Buren v. Digges*, 11 How. U. S. 461; *Wolfe v. Parham*, 18 Ala. 441; *Simpson v. McDonald*, 2 Ark. 570; *Farmer v. Francis*, 12 Ired. 282; *Haydon v. Madison*, 7 Greenlf. 76.

³ *Veazie v. Bangor*, 51 Me. 509; *Dermott v. Jones*, 23 How. U. S. 220; *S. C.* 2 Wall. 1; *Williams v. Porter*, 51 Mo. 441; *Cometa Falls M. Co. v. Rogers*, 19 Ga. 416; *Denmead v. Coburn*, 15 Md. 29; *Bishop v. Price*, 24 Wis. 480; *Hyde v. Booraem*, 16 Pet. 169; *Clayton v. Blake*, 4 Ired. 497; *Jewett v. Weston*, 11 Me. 246; *Norris v. School District*, 12 Me. 293; *Newman v. McGregor*, 5 Ohio, 349; *Barker v. Rutland & W. R. R. Co.* 27 Vt. 766; *Elliot v. Wilkinson*, 8 Yerg. 411; *Horn v. Batchelder*, 41 N. H. 86; *Bertrand*

v. Byrd, 5 Ark. 651; *Cordell v. Bridge*, 9 Allen, 355; *Hawkins v. Gilbert*, 19 Ala. 54; *Conery v. Noyes*, 17 La. Ann. 201; *English v. Wilson*, 34 Ala. 201; *Allen v. McKibbin*, 5 Mich. 449; *McKinney v. Springer*, 3 Ind. 59; *McClure v. Secrest*, 5 Ind. 31; *Barkalow v. Pfeifer*, 38 Ind. 214; *B. & O. R. R. Co. v. Lafferty*, 2 W. Va. 104; *Smith v. Gaggerty*, 4 Barb. 614; *Taylor v. Merryweather*, 15 Ala. 735; *Escott v. White*, 10 Bush, 169; *Porter v. Woods*, 3 Humph. 56; *Hayward v. Leonard*, 7 Pick. 181; *Lord v. Belknap*, 1 Cush. 279; *Adlard v. Muldoon*, 45 Ill. 193; *Van Buskirk v. Murden*, 22 Ill. 446; *Austin v. Austin*, 47 Vt. 311; *Morrow v. Huntton*, 25 id. 9; *Bassett v. Sanborn*, 9 Cush. 58; *Cullen v. Sears*, 112 Mass. 299; *Jewell v. Schooeppel*, 4 Cow. 564; *Horn v. Batchelder*, 41 N. H. 86; *Eddy v. Clement*, 38 Vt. 486; *Dyer v. Jones*, 8 Vt. 205; *Hennessey v. Farrell*, 4 Cush. 267; *Walker v. Orange*, 16 Gray, 193. If the special contract has been performed or is at an end by an act of the employer, the contractor can recover for what he has done in general assumpsit. *Bassett v. Sanborn*, 8 Cush. 58, 66, 67; *Western v. Sharp*, 14 B. Mon. 177; *Escott v. White*, 10 Bush, 169.

the contract for such failure, or of permitting the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor cannot recover on the contract, because he cannot make or prove the necessary allegations on his part. But if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable for the contract price of the work, less such damages as he has sustained from the contractor's failure to fulfil the contract within the stipulated time.¹ Similar considerations will raise a duty to pay for work done in good faith towards the fulfilment of a contract, notwithstanding deviations from it, where the employer is aware of such departures and does not object to them, or accepts the work after it is done and derives a benefit from it. He is liable to pay the contract price if the contract can, or so far as it can, be applied to the work, deducting therefrom such damages as will compensate the employer for the defects in the work or materials, or for his disappointment in not having the work done in the very manner stipulated for; and so far as the contract cannot be traced in or applied to the work, it will be estimated without regard to it; but the employer should not lose by the violation of the contract nor the contractor gain by it. On the whole, the employer should have such deduction made from the contract price as will be equal to the difference between the value of the work agreed to be done and the work actually done.²

The inquiry is not what, under other circumstances, the contractor would be entitled to recover, but what is he entitled to in reference to the contract price, and the damages sustained by the employer in consequence of the want of a strict performance on the part of the plaintiff.³ The employer may introduce evidence of the amount necessarily expended by him in getting the work completed;⁴ or of what it would cost to complete

¹ Phillips, etc. Const. Co. v. Seymour, *supra*.

² Farmer v. Francis, 12 Ired. 282.

³ Ladue v. Seymour, 24 Wend. 60.

⁴ Clark v. Russell, 110 Mass. 133;

Colton v. Good, 11 U. C. Q. B. 153;

Lamoreaux v. Rolfe, 36 N. H. 33.

After the breach of such a contract, evidence of a subsequent agreement between the plaintiff and third per-

it.¹ And where a reduction of the contract price is sought by evidence that the work was not properly done, it is not competent for the contractor to prove in answer that it would have been worth more than the contract price to have done the work in a workmanlike manner.² Nor is the amount saved to the employer by letting a new contract to complete the work the test of the amount equitably due the prior contractor for work done and material furnished, under a contract he has failed to complete.³

Where there are damages to the employer growing out of the non-performance of the contract, which do not enter into the contract price, he may recoup them in the contractor's action upon a *quantum meruit*.⁴ Thus, where a plaintiff had entered into a contract with a railroad company to construct for them a swinging drawbridge over a river, in accordance with a submitted plan and tracings, for a stipulated price; in an action for the price the company set up alleged defective construction of the bridge, and consequent delays and expenses, and claimed by way of recoupment the resulting damages. On the trial the deposi-

sions, and the amount to be paid for the performance of the same services, but which agreement is not carried out, is not competent as tending to show the amount of damages; otherwise, if the services had been performed under such agreement.

The court say by Eastman, J.: "The value of property may be shown by actual sales of property itself, or of similar property situated under like circumstances. Such is the settled rule in this state. *Whipple v. Walpole*, 10 N. H. 130; *Beard v. Kirk*, 11 N. H. 397; *White v. Concord Railroad*, 30 N. H. 188.

"So an offer to sell property by the owner may be evidence against him as tending to show that the property was worth no more. *Hersey v. Ins. Co.* 27 N. H. 149. It is in the nature of an admission on his part as to its value.

"Upon the like principle it is competent to show the price paid for doing certain or similar labor, or tending to prove the value of the labor. And, as against a party, an offer by him to perform the work would be admissible, as showing what it was worth.

"But the evidence used upon the trial in this case does not fall within this principle. It does not appear that the work was ever performed, . . . or that the contract . . . was ever carried into effect. The evidence was not used against the party making the contract, but in his favor."

¹ *Gonzales College v. McHugh*, 21 Tex. 256.

² *Williams v. Keech*, 4 Hill, 168.

³ *Michigan Paving Co. v. Detroit*, 34 Mich. 201.

⁴ *Allen v. McKibbin*, 5 Mich. 449.

tion of a witness was offered, to whom interrogatories had been put, inquiring whether the structure and arrangement of the bridge caused any injury or damage, hindrance or delay to the company in running the road; and whether hindrance or delay was caused by the imperfect construction of the bridge to any vessel navigating the river; and whether the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river; and what number of hands were required to work the drawbridge, and what number would be needed if it had been properly constructed; and it was held that the interrogatories were proper and pertinent in themselves; that the objection that they related to speculative damages did not apply to the first and last, in which the damages would be capable of actual estimation; and that the facts sought would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the contractor's demand.¹ The right to recover on a *quantum meruit* for a bona fide part performance is not precluded by the fact that by the contract, under which the work was done, payment was to be made otherwise than in money, if the employer has refused to make compensation in the mode provided by the contract.²

On the completion of the work, or such part of it as the contractor performs, if the employer may reject it without giving up his own property on which the labor has been bestowed, and thus decline any benefit from it, his omission to exercise that

¹ Railroad Co. v. Smith, 21 Wall. 255.

² Bassett v. Sanborn, 9 Cush. 58. In Barker v. Rutland & Washington R. R. Co. 27 Vt. 766, the contractor by his contract was to receive in payment a certain proportion of the defendant's stock. Upon finishing his work he demanded his pay, claiming that his contract had been performed; this was denied by the defendant, and payment on that account was refused. The market price of the stock, at this time, was thirty-three per cent. of its par value. It being determined that the

plaintiff was entitled to recover a sum less than the whole stipulated price, not upon a strict and literal performance of the contract, but upon equitable grounds, his recovery of that part of his claim which was made payable in stock, it was held, should be limited to the market value of the stock at the time of the demand. But see Roberts v. Wilkinson, 34 Mich. 129; Clark v. Fairchild, 22 Wend. 576; Mitchell v. Gile, 12 N. H. 390; Fitch v. Casey, 2 G. Greene, 300; Weart v. Hoagland, 22 N. J. L. 517; Harrison v. Lake, 14 M. & W. 139.

privilege, and his reception, use and appropriation of the work, afford undoubted ground of recovery for it on reason and authority. If the work has not been done in conformity to the contract, the employer is not obliged to receive it, and if he does not, he incurs no liability for it. And where he signifies his rejection of work which has been done for him upon his own property, under a special contract, but not in accordance therewith, and gives the contractor permission to take to himself or retain the property upon which the work has been done, on paying for it, there is no acceptance by voluntary appropriation of the insufficient work; and where such a rejection is practicable, there ought to be no liability if the employer avails himself of this method of avoiding it. Such a rejection is not always practicable; when it is not,—when the employer must receive the benefit as the work progresses, and in advance of any deviations from the contract, and he acts promptly to make and enforce his objection when there is defective work or delay, there is no ground of voluntary acceptance for holding him liable otherwise than by the terms of the special contract. On the other hand, the want of objection and apparent acquiescence where there is knowledge of the actual character of the work, would be a fraud on the contractor if he were thus encouraged to proceed with the work, and still be at the hazard of losing all compensation except on terms of showing a punctilious performance of the contract. It is not the duty, however, of the employer to watch the progress of work under a special contract, to see that such work is in all respects conformable to its requirements; unless this duty is imposed by the contract. Hence, in many cases, erections on the employer's land are contracted for, or work on the employer's materials, and no inspection is made or required to be made before the work is offered for acceptance as complete; then objections may be freely made. The employer may retain and take the benefit of the work, because it is done on his land or materials. He is not required to abandon his property in order to reject the work. It has often been held that if objections are made at that time by the employer, indicating that he is not satisfied with the work, or even keeps silent, and there is no intention in fact to waive objections, he may use and derive benefit from the work

without having such use construed as an acceptance by which he becomes liable to pay for it upon an implied assumpsit.¹ In some of the states, and particularly in New York, the employer has the right to insist on a strict performance of a building contract by which a building is to be erected on the employer's land, and may successfully resist the collection of any compensation until the performance of the condition precedent, or an intentional waiver of objections, however beneficial the actual performance may be. The mere occupation of a building, in such a case, is not a waiver of strict performance of the contract for its erection. The employer is entitled to retain, without compensation, the benefit of a partial performance, where, from the nature of the contract, he must receive such benefit in advance of a full performance, and is by the contract under no obligation to pay until the performance is complete.²

It was held in California, that in order that the doctrine of liability upon an implied contract may be applied, there must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept the work; and where such election will or may influence the conduct of the other party with reference to the work itself.³

But there is generally a more liberal consideration of the equitable rights of the contractor where he has, in good faith, endeavored to comply with his contract, and his labor has added value to the employer's property, and a benefit necessarily accrues to him. Independent of any election to accept, the honesty of the contractor's efforts towards full performance, the beneficial character of the work, and the impossibility of the employer declining and rejecting it so that the contractor may make it useful to himself, have induced the courts to adopt the rule of awarding compensation to the contractor to the extent that the employer is thus benefited. As early as 1828 it

¹Zottman v. San Francisco, 20 Cal. 96.

²Smith v. Brady, 17 N. Y. 173;

Brown v. Weber, 38 id. 187; Adlard v. Muldoon, 45 Ill. 193.

³Zottman v. San Francisco, 20 Cal. 96.

was acted upon in Massachusetts, and has been repeatedly approved in later cases in that state as well as in others. It was thus stated as a question on which there were many conflicting opinions: "Whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on the contract; yet, nevertheless, the work and materials are of some value and benefit to the other contracting party; he may recover, on a *quantum meruit*, for the work and labor done, and, on *quantum valebant*, for the materials. We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another, shall be held to pay for them, so as, in all events, he shall lose nothing by the breach of the contract."¹

The doctrine is firmly established in Vermont, that where a contract has been substantially, though not strictly performed; where the party failing to perform according to the terms of his contract has not been guilty of a voluntary abandonment or wilful departure from the contract; has acted in good faith, intending to perform the contract according to its stipulations; and has failed in a strict compliance with its provisions; and when, from the nature of the contract, and of the labor performed, the parties cannot rescind, and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the others; in such cases the party failing to perform his contract strictly may recover of the other, as upon a *quantum meruit*, for such sum only as the contract, as performed, has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work. The rule is treated as a relaxation from the strictness of

¹Hayward v. Leonard, 7 Pick. 181; Smith v. First Cong. Meeting House, 8 id. 178; Bassett v. Sanborn, 9 Cush. 58; Snow v. Ware, 13 Met. 24; Cardell v. Bridge, 9 Allen, 355; Walker v. Orange, 16 id. 193; Morse

v. Potter, 4 id. 292; Powell v. Howard, 109 Mass. 192; Cullen v. Sears, 112 id. 299; Atkins v. County of Barnstable, 97 id. 428; Clark v. Russell, 110 id. 133.

the ancient law, standing upon the solid ground of necessity and equity. but to be guarded with care, lest in its application it should tend to impair the obligation and faithful performance of agreements. The contractor must have intended, in good faith, to fulfil the terms of the contract. The spirit of the contract must be faithfully observed, though the very letter of it fail. A voluntary abandonment, or a wilful departure from its stipulations, are not allowed. The principle applies only in cases where the contract cannot be rescinded, but, from its nature, the labor performed under it must enure to the benefit of the other, and where it would be inequitable for the party benefited to so retain it without making compensation.

The party failing to perform can only recover such a sum as his labor has benefited the other party. Had he strictly and literally kept his agreement, he would have been entitled to the contract price. Failing in this — 1st, he must deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms; — or, where that is impossible, or unreasonable, such sum as will fully compensate him for the imperfection in the work, and the insufficiency of the materials, so that he shall in this respect be made as good pecuniarily as if the contract had been strictly performed; 2d, the party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract may have occasioned to the other.¹ The substan-

¹Kelly v. Town of Bradford, 33 Vt. 35. See Brackett v. Morse, 23 id. 554; Kettle v. Harvey, 21 id. 301; Morrison v. Cummings, 26 id. 486; Hubbard v. Belden, 27 id. 645; Barker v. Troy & Rutland R. R. 27 id. 750; Swift v. Harriman, 30 id. 607; Eddy v. Clement, 38 id. 486. In Dyer v. Jones, 8 Vt. 205, Redfield, J., said: "Where, from the nature of the contract, it is impossible to put the parties in *statu quo*, as where A builds a house or wall on B's land. or, as in the present case, where labor has been performed on the plaintiff's land by defendant, from which the plaintiff will and must derive some benefit, and which

cannot be transferred to defendant, the party really entitled to it, it has been held that the party performing the labor might recover so much *only* as the labor is worth to the party who *must* have the *benefit* of it. This rule is adopted *ex necessitate*, to prevent one party gaining an unconscionable advantage over the other. The failure to perform the contract strictly according to its terms may have been rather the misfortune than the fault of the party, but it forever precludes a recovery *upon the contract*, for a strict performance is a condition precedent to any right of action.

"But the laborer is entitled to his

tial performance which is mentioned as requisite to bring a case within this equitable principle is not that near approach to perfect and complete fulfilment of the contract which is necessary to entitle the contractor to recover on the special contract. In one case the contractor was reported to deserve about half price and was allowed to recover.¹ In another he agreed to build a stone wall four and a half feet high, and more than half of it was less; but it was held that the contract was substantially performed, for the purpose of that remedy;² and in a later case, a contract was made to construct a road and bridge for the defendant under a written contract between the parties, which specified in detail the length, width and mode of construction of both, and required that the whole work should be done in a thorough, workmanlike manner, and be completed to the satisfaction and acceptance of the defendant's selectmen, by a specified date, at which time, in consideration of such completion, the defendants agreed to pay for the same. By this contract the road was to be built sixteen feet wide, and upon a line marked out by the selectmen; as built it varied from that line in some places two or three feet, and in some places it was not so wide in the rock cuts as was stipulated in the contract. There was a defect in the bridge, in the interlocking of the long timbers or chords; they were not put together with sufficient strength and thoroughness of workmanship to bear the strain that was to come upon them. As to these defects the court say: "This defect [in the bridge] would not at first be apparent. After the bridge had been used and subjected to severe tests by the drawing of heavy loads of stone over it, the defect began to appear. In the outset a slight additional expense would have probably remedied the insufficiency, but after the arch by use for some six months had become depressed to a level, the expense of restoring it, and making it as safe and durable as the contract required, was much more. It seems to

own labor or its product, where it is in a shape that he can carry it away. In this case he cannot. Hence the rule has been adopted, that the laborer may recover as on a *quantum meruit*, or in strictness what the labor is worth to the de-

fendant, and no more. Otherwise the party benefited would owe no equivalent, and the party laboring would be without all remedy."

¹ Dyer v. Jones, 8 Vt. 205.

² Gilman v. Hall, 11 Vt. 510.

us that the failure in this point, clearly not from design, but rather the misjudgment and misfortune of the plaintiffs, should not subject them to a total loss of their labor. So severe a rule would hardly be consistent with a reasonable regard for the infirmity of human nature, and for that liability to mistake and failure which attends upon the best efforts of wise and skilful men. The defects in the making of the road seem to have been of still less significance: a divergence from the exact line staked out by the selectmen, but not thereby appearing to work any actual inconvenience; insufficiency in the construction of a bank wall; imperfections in making the road narrower than the contract required in some places, and not bringing it to the exact grade specified. But since the plaintiffs claimed the road as completed, it has been used by the public, and these defects do not seem to have impaired its use or convenience, or to have occasioned actual damage to any one."¹

Principles more or less liberal have been declared in other states in favor of defaulting contractors who have performed in part, and from whose work the employer, in fact, derived a benefit; and recoveries permitted on a *quantum meruit*, for a beneficial performance which was not sufficient to support an action upon the contract, either on the ground of voluntary appropriation, or the benefit the employer must necessarily derive from the work as done.²

CERTIFICATE OF ARCHITECT, ENGINEER, ETC.—In important contracts for the erection of buildings and the construction of roads, it is very common to provide for evidence of the due progress and full performance of such contracts in the certificate of an architect, engineer or other person. When such a certificate

¹Kelly v. Town of Bradford, 33 Vt. 35.

²Veazie v. Bangor, 51 Me. 509; Horn v. Batchelder, 41 N. H. 86; Bertrand v. Boyd, 5 Ark. 651; Jackson v. Jones, 22 id. 158; Newman v. McGregor, 5 Ohio, 349; Goldsmith v. Hand, 26 Ohio St. 101; Gonzales College v. McHugh, 21 Tex. 256; Carroll v. Welch, 26 Tex. 147; Hilliard v. Crabtree, 11 Tex. 264; Hous-

ton, etc. R'y Co. v. Mitchell, 38 Tex. 85; Allen v. McKibbin, 5 Mich. 449; Clayton v. Blake, 4 Ired. 497; Elliott v. Wilkinson, 8 Yerg. 411; Porter v. Woods, 3 Humph. 56; Harwood v. Tappan, 2 Speers, 536; Williams v. Porter, 51 Mo. 441; Yeates v. Ballentine, 56 Mo. 530; Estop v. Fenton, 66 Ill. 467; Lighthouse v. Caldwell, 56 id. 108; Cong. Society v. Hubbell, 62 id. 161.

is a condition precedent to payment, it must be produced, and is the exclusive evidence, in an action upon the contract;¹ unless the absence of such certificate is excused by proof of his sickness, death, or refusal to act. And when made it is conclusive between the parties;² if on its production it is not impeached for fraud or mistake.³ Where, however, the contract leaves it optional with the contractor whether there shall be an inspection, or requires it only if he shall so request, he may bring suit without having his work certified.⁴

The measurement or estimate, to be conclusive, must be made in accordance with the contract. If required to be made for the purpose of periodical payments during the progress of the work, the meaning is that the estimates shall be accurate and final, not mere approximate or conjectural estimates.⁵ Where by the terms of a contract for the repair of a building, it is stipulated that the articles shall be of the best quality, and the work performed in the best manner, subject to the acceptance or rejection of an architect; all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted; the acceptance by the architect of a different class of work, or of inferior materials, will not bind the owner, and does not relieve the contractor from the agreement to perform according to the plans and specifications. The provision for acceptance is an additional safeguard against defects not discernable by an unskilful person.⁶

In New York it has been decided that, under a contract for the construction of a railroad, by which all measurements are to be made, and the amount of labor to be determined by

¹ *Smith v. Brady*, 17 N. Y. 173; *President, etc. D. & H. C. Co. v. Penn. Coal Co.* 50 id. 250; *Smith v. Briggs*, 3 Denio. 73; *Hennessey v. Farrell*, 4 Cush. 267.

² *Walker v. Orange*, 16 Gray, 193; *McMahon v. N. Y. & E. R. R. Co.* 20 N. Y. 463; *Haight v. Vermont C. R. R. Co.* 27 Vt. 700; *Koeltz v. Bleckman*, 46 Mo. 320; *Thomas v. Flemev*, 26 N. Y. 26; *Merrill v. Gore*, 29 Me. 346.

³ *Condon v. South Side R. R. Co.*

14 Gratt. 302; *Wyckoff v. Meyers*, 44 N. Y. 143; *Baltimore & O. R. R. Co. v. Polly*, 14 Gratt. 447; *Board of Education v. Shaw*, 15 Kan. 33; *Haight v. Vermont C. R. R. Co.* 27 Vt. 700; *Woodruff v. Hough*, 91 U. S. 596. See *Bledsoe v. Gonzales Co.* 31 Tex. 636.

⁴ *Sherman v. Mayor, etc. of N. Y.* 1 Comst. 316.

⁵ *Haight v. Vermont C. R. R. Co.* 27 Vt. 700.

⁶ *Clacius v. Black*, 50 N. Y. 145.

the employer's engineer, whose decision is final, the contractor is entitled to notice, and an opportunity to be present; and that he is not concluded by measurements made *ex parte*.¹ In Illinois it has been held that notice is not necessary unless the contract requires it.²

WHERE EMPLOYER STOPS THE WORK.—Where the contractor's performance is stopped by the fault or direction of the employer, he can not only recover on the *quantum meruit* for what he has done, but also damages for being prevented from completing the contract, by bringing his action on the contract.³ If the action is on a *quantum meruit* the measure of damages will be what the work done is worth, not necessarily the contract price.⁴ In cases where, in the progress of particular work, periodical measurements or inspections are provided for, and made for the purpose of partial payments, the sums thus ascertained to be payable are the measure of the compensation to be recovered for the work so measured or inspected, if the employer afterwards breaks the contract by stopping the work, and they have not been paid. The contractor in such an event may recover the percentage stipulated to be reserved until the completion of the undertaking, and it becomes immediately payable. When the contract is annulled, or repudiated by the employer, and the contractor is prevented from going on to a completion of the work, the amount so reserved becomes part of the arrears of the periodical payments, to which he is as much entitled as if he had been permitted to finish the entire contract. It is released from the conditions under which it was retained by the employer's act, and the contractor is entitled to include it as an amount expressly admitted to be due. He also is concluded by these settlements, and by reason of their being closed as distinct and separate portions of the contract; and he cannot open them again to prove and re-

¹ *McMahon v. N. Y. & E. R. R. Co.* 20 N. Y. 463.

² *McAuley v. Carter*, 22 Ill. 53.

³ *Black v. Woodrow*, 39 Md. 194; *Wilson v. Bauman*, 80 Ill. 493; *Whitfield v. Zellnar*, 24 Miss. 663; *Orange, etc. R. R. Co. v. Placide*, 35 Md. 315; *Myers v. York, etc. R. R. Co.* 2

Curt. C. C. 28; *Clark v. Franklin*, 7 Leigh, 1.

⁴ *Kearney v. Doyle*, 22 Mich. 294; *Cox v. Western Pacific R. R. Co.* 47 Cal. 87; *Clark v. Mayor, etc. of N. Y.* 4 Comst. 338; *Derby v. Johnson*, 21 Vt. 17.

cover the actual value of the work. But so far as other work has been performed, which remains unadjusted between the parties, the contractor is at large upon his *quantum meruit*, and is at liberty to prove the actual value. Here the rates of compensation stipulated by the contract are no longer binding upon the parties. They constitute but an element in the proof proper to go to the jury as *prima facie* evidence of value, leaving it still open to the parties to show that the average standard of prices agreed on ought to be more or less, according to the difficulties and value of this particular portion of the work in comparison with other portions.¹

Permitting the work to be stopped by an injunction at the suit of a third person,² as well as by omission to perform some precedent or concurrent condition, is such a prevention, by the employer; and gives a right to damages for loss of the profits on that part of the contract which he is thus prevented from executing.³ The profits which are permitted to be recovered are those which are the direct and immediate fruits of the contract. These are part and parcel of the contract itself,—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.⁴ In an action upon the contract against the employer for preventing the complete performance, the contractor is entitled to recover the contract price for the work actually done, and, in the absence of other damages,⁵ the difference between the contract price, and

¹ Rodemer v. Hazlehurst, 9 Gill, 288.

² Doolittle v. Nash, 48 Vt. 441; Whitfield v. Zellnar, 24 Miss. 664.

³ Grand Rapids, etc. R. R. Co. v. Van Dusen, 29 Mich. 431; Thorp v. Ross, 4 Keyes, 546; Kugler v. Wiseman, 20 Ohio, 361; Allaman v. Mayor, etc. of Albany, 43 Barb. 733; Christian County v. Overholt, 18 Ill. 223; Palm v. Ohio & Miss. R. R. Co. 18 Ill. 217.

⁴ Masterton v. Mayor of Brooklyn, 7 Hill, 61; Lawrence v. Wardwell, 6 Barb. 423; Thompson v. Jackson, 14 B. Mon. 114.

⁵ An action for money paid will lie upon a special contract, by which the plaintiffs, at the request of the defendants, detained their laborers and paid them wages, while waiting for material which the defendants were to furnish. Chesapeake & Ohio Canal Co. v. Knapp, 9 Pet. 541.

what it would cost to perform the contract as to the residue.¹ In an action against a railroad company to recover damages on account of their preventing the performance by the plaintiff of a contract for the construction of their roadway, the difference between the amount of the principal contract and of the sub-contract entered into by the plaintiff with other persons for the performance of the same work, does not constitute the measure of damages.² The contract price may be recovered if there is no certain mode of ascertaining the damages to be less.³

Where a party was prevented from completing a contract in the proper season by the neglect of the employer to furnish the necessary material, and the contractor for that reason was entitled to abandon the contract, but did not; and afterwards, on being furnished with the material, proceeded to complete the contract, it was presumed that he proceeded under the contract; that it therefore furnished the measure of compensation; and he could not recover extra pay by showing that the work was worth more on account of the state of the weather, or because the ground was frozen.⁴ If any damages from that cause could be ascertained with the requisite certainty, they were recoverable on account of the employer's breach of the contract.⁵ In a New York case,⁶ it was held that, under a right reserved by

¹ Philadelphia, etc. R. R. Co. v. Howard, 13 How. U. S. 307; Heine v. Meyer, 61 N. Y. 171; Jones v. Judd, 4 Const. 412; Prebb v. Bottom, 27 Vt. 249; Masterton v. Mayor of Brooklyn, 7 Hill, 61; N. Y. & H. R. R. Co. v. Story, 6 Barb. 419; S. C. 2 Seld. 85; Clark v. Mayor, etc. of N. Y. 4 N. Y. 338; Cunningham v. Dorsey, 6 Cal. 19; Barrill v. N. Y. S. S. Co. 14 Mich. 34; George v. Cahawba, etc. R. R. Co. 8 Ala. 234; Morrison v. Galloway, 2 Harr. & J. 461; Freedlander v. Pugh, 43 Miss. 111; Collyer v. Moulton, 9 R. I. 90; United States v. Speed, 8 Wall. 77; Allen v. Thrall, 36 Vt. 711; Derby v. Johnson, 21 Vt. 17; Thorp v. Ross, 4 Keyes, 546; Hale v. Trout, 35 Cal. 229; Morrison v. Lovejoy, 6 Minn. 319; Durkee v. Mott, 8 Barb. 423. In United States v. Speed, supra, the

court qualifies the rule stated in the text by adding, "making reasonable deductions for the less time engaged, and for release from the care, trouble, risk and responsibility attending its full execution."

² Story v. N. Y. & Harlem R. R. Co. 2 Seld. 85; Masterton v. Mayor of Brooklyn, 7 Hill, 61.

³ Baldwin v. Bennett, 4 Cal. 392; Danly v. Williams, 16 Wis. 581; Sprague v. Morgan, 7 Ala. 952; Manuel v. Campbell, 3 Ark. 324; Ashcraft v. Allen, 4 Ired. 98; Heyn v. Phillips, 37 Cal. 529. See Thorp v. Ross, 4 Keyes, 546.

⁴ The Western Union R. R. Co. v. Smith, 75 Ill. 496.

⁵ Id.

⁶ Clark v. Mayor, etc. of N. Y. 3 Barb. 288.

the employer to make alterations, he was not entitled to stop the work. The court approved the action of the referee in allowing more than the contract price for the part done, it appearing that it was worth less than the contract price to do what remained. But on appeal the court held that, under such reservation to make alterations in the form or dimensions of the work, the contractor is bound by any alteration made in pursuance of the agreement; that he could recover no more than the contract price for the work done before the alteration, although it be more expensive than the portion dispensed with by the alteration.¹ Where the sub-contractor upon a public work was stopped by the state, it was held that no damages could be recovered in respect to the unfinished part; that he was entitled to recover the contract price for the part performed, and that this was not subject to reduction, by proof that that part was less expensive than the part which remained to be done when the work was interrupted, although the contract price was uniform for the whole.²

¹ 4 N. Y. 338.

² Jones v. Judd, 4 N. Y. 412. See Grand Rapids, etc. R. R. Co. v. Van Dusen, 29 Mich. 431.

In Rittenhouse v. Mayor, etc. of Baltimore, 25 Md. 336, a contract had been made by the municipal corporation with the plaintiff for the latter to furnish the material and do the brick mason work for an alms house. After the buildings had been commenced, and some work done, an ordinance was passed reciting that the site was unhealthy and unsuitable, and declaring that the public good required the building to be discontinued and the site abandoned, and that another more suitable be selected. It repealed the ordinance under which the contract had been made, and directed the committee having charge of the work to settle with the contractor as far as it could be done on fair and equitable terms. No settlement having been made, the contractor brought suit, and claimed in his bill

of particulars: 1. His actual outlays in the preliminary steps for executing the contract. 2. An indemnity against his liabilities to those with whom he had contracted to enable him to fulfil his contract with the city. 3. Damages equivalent to the profits which he would have realized on the contract if he had been permitted to execute it. It was held that the contractor was not entitled to claim any damages on account of profits he might have realized under the contract if he had been permitted to go on with the work. And evidence offered to support the third item was properly rejected, as well as the evidence to support the second item for indemnity against loss on account of subsidiary contracts, the evidence as to the latter being vague, and there being no proof offered of any damage actually incurred. But he was entitled to recover on the first item any damages which he had actually sustained by reason of the contract

In ascertaining what it would cost to complete the contract after the employer has stopped the work, with a view to measuring the damages by the difference between such cost and the contract price, it is competent to prove any circumstance which should diminish such cost. Thus, where the work was of such character that it had to be done out of doors, and would hence be retarded and made more expensive by bad weather, it was held competent to show that the season after the employer had stopped the work, and when, otherwise, the contractor would have done it, was pleasant and exceptionally favorable.¹ In Georgia, the rule of computing the damages on the basis of profits that the contractor could have made if he had been permitted to finish his contract, is not adopted, unless, perhaps, where the case is one which admits of very precise and certain proof of what such profits would be.²

while the same was operative and in force. There was proof offered that the contractor had been for fifteen years engaged in the manufacture of brick near the city of Baltimore, and that at the date of the contract he had on hand 60,000 brick of his own manufacture, which were of ready sale in the market, but which he retained in hand in consequence of the contract, and to enable him to supply bricks necessary for the work. He was allowed to recover damages in respect to decrease in the market value of the brick before notice for the abandonment of the work.

In *Kugler v. Wiseman*, 20 Ohio, 361, the contractor undertook to do certain work by the 1st of August. After the work had been commenced, the employer requested a suspension, which took place. The work was resumed a month later at the employer's request, and upon his promise to pay over and above the contract price the additional cost of the work in consequence of any increase in the price of wages

and materials. The work being finished in January following, suit was brought, not on the contract, but for work and labor. It was held that the contract might be put in evidence by the plaintiff. It was also held that, in order to arrive at the increased cost of the work, in consequence of an advance in the price of labor and material, it was proper to inquire of a witness generally the difference in the price of wages and materials in the spring and summer months, and the fall and winter months, although the question is not limited to the particular year in which the work was done. Inquiry may be made as to the difference in the price generally, and then ascertain whether the difference in this particular year varied from others.

¹ *Burrell v. N. Y. & C. Co.* 14 Mich. 34. But see *Masterton v. Mayor of Brooklyn*, 7 Hill, 61.

² *Vischer v. R. R. Co.* 34 Ga. 536. In this case the question was what is the measure of damages against a railroad company for fraudulently

If the employment of a contractor is to construct articles out of his own materials, and he is prevented by the employer from proceeding in the execution of his contract, he cannot recover under the common count for work and labor done and material furnished for unfinished articles that were not delivered, and the

hindering a contractor from completing its road? Walker, J., said: "Much was said as to the proper measure of damages in the case; and it is claimed, especially, that the court erred in ruling out Mr. Hall's testimony, introduced for the purpose of showing the amount of damages complainants sustained, or rather what amount of profits they would have made if they had completed the work according to the stipulations of the alleged contract. The jury having found the facts against the complainants, renders it unnecessary to decide what would have been the proper measure of damages in case the finding had been otherwise. Mr. Hall, from a profile of the projected road, makes a calculation of the quantity of work to be done, an approximation rather, and says: 'Under ordinary favorable circumstances, some profit should be made on each of the items of work at the price proposed.' He enumerates various circumstances which it would be necessary to include, 'in order to estimate accurately the cost;' and adds, 'then, the weather would greatly affect the result, so that no exact calculation could be made until the job is finished.' 'A good deal would depend on whether the hands were able to work; much would depend on whether they were well or sick, or run away. If they were sick or ran away most of the time, the contractor would make nothing.' 'Railroad contractors, when experienced, do get frequently mistaken as to

underground work, and they sometimes find it for their interest to abandon a contract, and do sometimes abandon them.' The proposition of complainants is to ascertain by this sort of testimony how much money defendant shall pay them. In *Coweta Falls M. Co. v. Rogers*, 19 Ga. 417, this court decides that 'prospective profits which are speculative and conjectural are usually too remote and uncertain to enter into the estimate of damages to be allowed for breach of contract.' In delivering the opinion in this case, Lumpkin, J., says: 'We are inclined to think that this whole testimony as to the gains which the plaintiff would have derived from this contract, had he not been prevented from realizing them by the delinquency of the defendant, should have been rejected as too contingent and speculative, and too dependent upon the fluctuation of the markets, the chances of business, and other casualties, to enter into a safe or reasonable estimate of damages. And in lieu thereof a calculation should have been made of the loss actually sustained by the hire of hands, the interest on the investment, and solid data like these, as the criteria of loss by the detention of the machinery.' P. 420. We are aware that this case is not, in its facts, like the one at bar, but how much alike in the uncertainty of the evidence by which the amount of damages is to be ascertained. Again, in the *Water Lot Co. v. Van Leonard*, 30 Ga. 560, this court decides:

property in which never vested in the employer.¹ The defendant may show in defense that the performance would cost more than the contract price.² So the contractor may enhance the damages by showing that expenses have been incurred in preparations for performance.³ A part performance should be considered with reference to the scope of the entire contract, when the employer in his own wrong, or in the exercise of a right reserved, puts an end to the contract. Thus, the plaintiffs, in August, agreed to deliver to the defendant as ordered, monthly, throughout a year, logs averaging a certain diameter, the defendant to have the option to determine the contract, and then to pay the plaintiffs the cost of the logs cut and ready for delivery or afloat, and which they have on hand in view of their contract; the defendant terminated the contract in October, the plaintiffs having on hand some logs afloat, and others cut in the woods, but not removed; these were measured, and found to be nearly all of less than the specified average diameter; but it was held that in the absence of evidence that the plaintiffs had acted unreasonably or in bad faith, the defendant was liable for the cost of all the logs, and not merely of such as would average of the specified diameter.⁴

'That the measure of damages was the interest on the investment for the time the machinery was not employed for want of water,' caused by the failure of the other party to perform his contract; and affirm the case in the 19th Ga. We are aware that some cases hold that the proper measure of damages is the difference between the price to be paid and the actual cost of performing the contract. There may be cases where this may be the correct rule, but the cases already cited show the strong tendency of this court to discard 'speculative profits' and be controlled by 'solid data' in estimat-

ting the amount of damages to which a party may be entitled for a breach of contract. We do not intend to be understood as laying down a rule for ascertaining the amount of damages a party, for the breach of contract of this kind, would be entitled to. It will be time enough to do so when the case before us shall make it necessary."

¹ Allen v. Thrall, 36 Vt. 711.

² Durkee v. Mott, 8 Barb. 423.

³ Id.; United States v. Speed, 8 Wall. 77; Thompson v. Jackson, 11 B. Mon. 114.

⁴ Wolf v. Boston Veneer Box Co. 109 Mass. 68.

SECTION 3.

SALVAGE.

Requisites of salvage service—A specific amount may be fixed by agreement—The nature of the peril, and the duty of the salvor to the vessel—Property must be saved by salvage service—Amount recoverable as salvage—Derelict property—Forfeiture of salvage by misconduct.

REQUISITES OF SALVAGE SERVICE.—A salvage claim is in the nature of a *quantum meruit*; but certain facts must exist to give it validity: First, a marine peril to the property to be rescued; second, voluntary service not owed to the property as a matter of duty; third, success in saving the property, or some portion of it, from the impending peril.¹ These requisites distinguish salvage service from that which is compensated on the *quantum meruit* at common law. Hence, a right to compensation may exist for service in saving a vessel, though it does not constitute a claim for salvage. Thus, where valuable services were rendered upon the employment of the owners, to a vessel in imminent peril, by one having great skill in rescuing wrecked vessels, and unusual means adapted to such exigencies, but under circumstances which prevented him from being compensated on the principles of salvage, it was held that he was entitled to recover a very liberal allowance for his services, to be measured as well by the extent of his skill and means, as by the time and number of men employed.² So compensation for meritorious services in relieving a vessel aground, or otherwise in distress or danger, or even in attempting to do so, may be allowed, upon a bill for salvage, although a case for salvage compensation is not made out.³

A SPECIFIC AMOUNT MAY BE FIXED BY AGREEMENT.—An agreement for a specific sum dependent upon success does not alter the nature of the service, but only furnishes a rule of compensation. Nor will such an agreement be set aside and a higher rate allowed because it proves to be a hard one for the salvor.⁴

¹ The *Clarista*, 23 Wall. 1.

² *Sturges v. Law*, 3 Sandf. 451.

³ The *Sailor's Bride*, 1 Brown's Adm. 68; The *Williams*, id. 208; The *Clarion*, id. 74; *George v. The*

Arctic, Bee, Adm. 232; The *J. F. Farlan*, 8 Blatchf. 207.

⁴ The *Silver Spray's Boilers*, 1 Brown, Adm. 349.

And a person hired to assist with a knowledge that his employer is operating under such a contract is also limited in the amount of his recovery by the contract price; and the fact that he is uninformed as to the terms of the contract will not subject the property or the owners to an additional liability.¹ Contracts made for exorbitant compensation when the property is in peril will be closely scrutinized and not upheld.² Where the salvor, however, has not taken advantage of his power to make an unreasonable bargain, courts of admiralty will enforce contracts made for salvage service.³ To defeat a salvage suit on the ground of a special contract, nothing short of a contract to pay a given sum for the services to be rendered, or a binding agreement to pay at all events, whether successful or unsuccessful in the enterprise, will have that effect.⁴

¹The Silver Spray's Boilers, 1 Brown, Adm. 349; The Marquette, 1 Brown, Adm. 364.

²200 Tons of Coal, 7 Ben. 343; The A. D. Patchin, 1 Blatchf. 414; Williams v. The Jenny Lind, 1 Newb. Adm. 443; Cowell v. The Brothers, Bee, Adm. 136; Schultz v. The Nancy, id. 139. See Post v. Jones, 19 How. 150.

³The J. G. Paint, 1 Ben. 545.

⁴The Comanche (8 Wall. 448). In this case the defense offered was that the services rendered were not salvage services; because, as alleged, they were rendered under an agreement for a fixed sum. Clifford, J., said, referring to it: "Three answers may be given to that proposition, each of which is sufficient to show that it cannot be sustained. (1) No such defense was set up in the answer. (2) Nothing was ever paid or tendered to the libellants for that part of their claim now in controversy, and it is well settled law that an agreement of the kind suggested is no defense to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment. Such an agreement

does not alter the character of the service rendered; so that if it was in fact salvage service, it is none the less so because the compensation to be received is regulated by the terms of an agreement between the master of the ship or the owners of the salvaged property. The Emulus, 1 Sumn. 207.

"Defenses in salvage suits, as well as in other suits in admiralty, must be set up in the answer, and if not, and the services proved were salvage services, the libellants must prevail. The Boston, 1 Sumn. 328. Agreements of the kind suggested ought certainly to be set up in the answer, as it is not every agreement which will have the effect to diminish a claim for salvage compensation. On the contrary, the rule is that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage. The Versailles, 1 Curt. 353; The Lushington, 7 Notes of Cases, 361; The Centurion, 2 Ware, 490; The Foster,

Parties may agree on the amount of salvage compensation, or on the principles on which it shall be adjusted, and such agreements, if fairly made, and no advantage be taken of ignorance or distress, are readily upheld by the courts.¹

THE NATURE OF THE PERIL, AND THE DUTY OF THE CLAIMANT TO THE VESSEL.—The vessel must be in imminent peril, but it is not necessary that but for the service for which salvage is claimed, it would have been lost.² It may be a peril from shipwreck, fire, pirates, or enemies;³ but it must not be a peril originating in the negligence or fault of the salvors.⁴ Salvors cannot force themselves upon a vessel in distress against the will of the master;⁵ nor found a claim for salvage upon acts which are in themselves tortious or unlawful.⁶ Seamen belonging to the ship in peril cannot, as a general rule, claim salvage compensation; not only because it is their duty to save both ship and cargo, if it is in their power, but because it would be unwise to tempt them to let the ship and cargo get into a position of danger, in order that by extreme exertion they might claim salvage compensation.⁷ Pilots also are excluded from such compensation for

Abb. Adm. 222; *The Whitaker*, 1 Sprague, 282; *The Brig Susan*, id. 503; *Parsons on Shipping*, 275; *The Phantom*, L. R. 1 Adm. & Ecc. 58; *The White Star*, id. 68; *The Saratoga*, 1 Lush. 321; *MacLachlin on Shipping*, 531; *Coffin v. The John Shaw*, 1 Cliff. 230. (3) But if the agreement had been set up in the answer, it would constitute no defense, as by the terms of the instrument the libellants were not to receive any compensation whatever, or be entitled to any lien upon the property, unless the materials and machinery were substantially saved, so that it is clear that the compensation was not to be paid at all events." See *Bowley v. Goddard*, 1 Lowell, 154.

¹ *Harley v. 467 Bars of R. R. Iron*, 1 Sawyer, 1; *The Independence*, 2 Curt. 357; *The Emulus*, 1 Sumn.

207; *Bearse v. Pigs of Copper*, 1 Story, 314; *The True Blue*, 2 W. Rob. 176; *The Henry*, 2 Eng. L. & Eq. 564. See *Gould v. U. S. 1 Ct. Claims*, 183; *Bondies v. Sherwood*, 22 How. 214.

² *The Delphos*, 1 Newb. Adm. 412; *The Charles*, id. 329; *Talbot v. Seeman*, 1 Cranch, 1, 43.

³ *Id.*; *Lea v. The Alexander*, 2 Paine, 466; *Davison v. Sealskins*, id. 324.

⁴ *The Clarita and The Clara*, 23 Wall. 1; *The Copella*, L. R. 1 Adm. & Ecc. 356; *The Queen*, L. R. 2 id. 53.

⁵ *The Susan*, 1 Sprague, 503. See *Anna Leland*, 1 Low. 310.

⁶ *Talbot v. Seeman*, 1 Cranch, 28; *Davison v. Sealskins*, 2 Paine, 324.

⁷ *The Clarita and The Clara*, 23 Wall. 1; *Miller v. Kelly*, Abb. Adm. 564; *Hobart v. Drogan*, 10 Pet. 108; *Studley v. Baker*, 2 Low. 205.

any exertions or services rendered while acting within the line of their duty;¹ but they may become salvors like other persons in legal contemplation, if they perform extraordinary services outside of the line of their duty.² So may the crew of an imperiled vessel after they are discharged from their duty and allegiance as such;³ and passengers if they perform extraor-

¹ Studley v. Baker, 2 Low. 205; Hope v. The Dido, 2 Paine, 243.

² Bean v. The Grace Brown, 2 Hughes, 112; Montgomery v. The T. P. Leathers, 1 Newb. Adm. 421; The Wave v. Hyer, 2 Paine, 131. The pilot act of Oregon (S. L. 1868, p. 23) provides that the steam tugs and pilot boats at the mouth of the Columbia river shall tow and pilot vessels upon the pilot grounds between Astoria and the open sea outside of the bar, "in all weather" when the bar "can be crossed by first class steamers and sail vessels," for a uniform compensation in proportion to the draft of the vessel, called pilot fees. Under this act it has been held that so long as it is reasonably safe to take a vessel in tow, anywhere on the pilot grounds, the tug is bound to do so, and is not entitled to compensation therefor as a salvor; but that she is not bound to incur extraordinary risk to tow a vessel or to rescue it from danger of wreck; and when she does so, she is entitled to compensation therefor as a salvor. Roff v. Wass, 2 Sawyer, 389. In Hobart v. Drogan, 10 Pet. 108, Judge Story said: "A pilot, as such, is not disabled in virtue of his office from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit

of his services, viewed in the light of a liberal public policy. . . . Extraordinary events may occur in which (the seamen's) connection with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in which case they may be permitted to claim as salvors. Such was the case of the seamen left on board in the case of *The Blaireau*, 2 Cranch, 268; and such was the exception alluded to in the case of *The Neptune*, 1 Hagg, Adm. 237. In this last case Lord Stowell, after saying that the crew of a ship cannot be considered as salvors, gave what he deemed a definition of a salvor. 'What (said he) is a salvor? A person who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer, without any pre-existing contract that connects him with the duty of employing himself for the preservation of the ship.' And it must be admitted, that however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy and strikes at the root of those temptations, which might otherwise exist, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate. *Delong v. Peragio*, Bee, Adm. 212; *Hand v. The Elvira*, Gilp. 60; *Le Tegre*, 3 Wash. 567.

³ *The Olive Branch*, 1 Low. 286;

dinary services.¹ All persons who give any personal assistance in saving the property are salvors; and the ship, cargo, freight, etc., saved make one fund on the subject of salvage.²

PROPERTY MUST BE SAVED BY SALVAGE SERVICE.—Salvors, strictly so called, are persons who undertake to save property in peril at the request of the owner or the master; they are under the direction and control of such owner or master, and may be discharged by him, with or without good cause, upon being compensated for what they have already done, or without such immediate compensation, if their lien is not endangered.³ Risk of life is not a necessary element of salvage service; where such risk, however, is incurred in saving property, it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation. But the controlling inquiry in salvage is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors?⁴

Unless the property is saved in fact by those who claim as salvors, salvage will not be allowed, however good their intentions and however heroic and perilous their exertions.⁵ Where three vessels, at different times, rendered valuable services to a vessel in continuous peril, it was held that each was entitled to salvage, although the separate services of neither alone would have saved the vessel.⁶

Those who begin a salvage service and are in the successful prosecution of it are entitled to be regarded as the meritorious salvors of whatever is preserved, though wrongfully interrupted in the work by others who complete the service.⁷

AMOUNT RECOVERABLE AS SALVAGE.—The amount of salvage to be allowed is in the discretion of the court; there is no precise rule; nor is it in its nature reducible to rule; for it must in

The Antelope, 1 Low. 130; The Triumph, 1 Sprague, 428; The Blair-eau, 2 Cranch, 240; Hobart v. Drogan, 10 Pet. 108.

¹ The Two Friends, 1 W. Rob. 286; The Brunston, 2 Hagg, Adm. 3, note. See Bond v. The Cora, 2 Wash. 80.

² The Ottawa, 1 Low. 274.

³ The Ida L. Howard, 1 Low. 2.

⁴ The Charles Avery, 1 Bond, 119; Blagg v. The Becknell, 1 Bond, 270.

⁵ Montgomery v. The T. P. Leathers, 1 Newb. Adm. 421; The John Wurts, Olcott, Adm. 462; Clark v. The Dodge Henly, 4 Wash. 651.

⁶ The Island City, 1 Black, 121.

⁷ The John Gilpin, Olcott, Adm. 77.

every case depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, and so forth, all of which must be estimated and weighed by the court.¹ In an early case in this country, in which the foregoing observations were made, Johnson, J., said: "As far as our inquiries extend, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum; below that it is usual to adjudge a compensation *in numero*. In some cases, indeed, more than half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of very small amount."² The principle sought to be enforced is to make a fair division of the salvaged property between its owners and the salvors.³ The maritime policy is to make a liberal allowance. Not only the actual toil and expenses are to be considered, but also the imminent contingency that the service might prove unavailing, as by the breaking up of a vessel before any amount of the property could be saved.⁴ The amount to be allowed must be estimated by consideration of the danger and importance of the service; and the value of the property is an essential circumstance in estimating the latter.⁵

The usual rate of salvage is one-third of the value of the property saved.⁶ The rate has been increased to one-half to large and powerful steamers, to encourage their owners to engage in salvage service.⁷

Where a vessel was wrecked on Charleston bar, and her cargo of cotton cast ashore on the islands, and there secured by great labor and risk of life and health on the part of the salvors, the court noticed the fact that while employed in this service, and in securing and drying the cargo on shore, the growing crops of the salvors suffered from neglect.⁸ The whole net proceeds may be awarded

¹The Adventure, 8 Cranch, 221.

²Id.; Bearse v. Pigs of Copper, 1 Story, 314; Bond v. The Cora, 2 Wash. 80; British Consul v. Smith, Bee, Adm. 178. See McGinnis v. The Pontiac, 5 McLean, 359; Cross v. The Ballona, Bee, Adm. 193; The Doe Hemeands, 10 Wheat. 306; Smith v. The Stewart, Crabbe, 218; Hobart v. Drogan, 10 Pet. 108; Piesch v. Ware, 4 Cranch, 347; Ty-

son v. Pryor, 1 Gall. 133; The John Wurts, Olcott, Adm. 462.

³Id.

⁴The John Gilpin, Olcott, Adm. 77.

⁵Hand v. The Elvira, 1 Gilp. 607.

⁶Bond v. The Cora, 2 Wash. 80.

⁷The Saragossa, 1 Ben. 553.

⁸Stephens v. The Argus, Bee, Adm. 170; Bond v. The Cora, 2 Wash. 80. In the Attacapas, 3 Ware, 65, Ware, J., said: "The gen-

under special circumstances; as where the amount is small, and the owner of the property refuses to appear;¹ and counsel fees are sometimes considered by the court in estimating the amount to be awarded in salvage.² Where money is the thing saved, a fifth or a tenth, according to the circumstances, has been the ancient proportion.³

In awarding salvage upon a foreign vessel, courts in this country, it is said, will regard the rate of allowance in the courts of the owner's country.⁴ The rates of salvage compensation at sea cannot properly be adopted for such service on rivers.⁵ No distinction is made between vessel and cargo in awarding such compensation, on the ground that less exertion is necessary to save the cargo. The service is considered a single service, and to be compensated by a quantum of the proceeds of the whole property saved.⁶ So, where there are several sets of salvors

eral principle which governs courts of admiralty in awarding salvage is to give a liberal reward, not merely a compensation *pro opere et labore*, but such a reward as will be an inducement to men accustomed to the dangers of the sea to adventure on these perilous enterprises, by which not only property but often lives are saved. For saving life, at whatever risk, the courts can give no reward, for there is no common measure between life and money; but the merit of saving property may be measured by a pecuniary compensation. Another reason for liberality is to make the compensation such as will in some measure guaranty the honesty of the salvors, so that they shall not be tempted to pay themselves by the embezzlement of property left without protection; and farther, to insure the good faith of salvors, embezzlement is always visited with the entire forfeiture of salvage. . . . But, if I do not misjudge, there is another consideration belonging to this case that ought not to be overlooked. This vessel was rescued from the

perilous shores of Cape Cod, a coast as much dreaded by mariners as the *infames scopulos Acroceraunia* of antiquity. For the interests of humanity, as well as those of commerce, it is certainly desirable that the inhabitants of such a coast should understand that if they will hazard their lives in relieving vessels in distress, they will not be dismissed with a parsimonious reward, such as will the next time put them to a calculation of the relative value of a gallant and hazardous salvage and the plunderings of a wreck."

¹ *The Zealand*, 1 Low. 1; *Llewellyn v. Two Anchors and Chains*, 1 Ben. 80.

² *The Liverpool Packet*, 2 Sprague, 37.

³ *Taylor v. The Friendship*, Bee, Adm. 175.

⁴ *The Waterloo*, Blatchf. & H. Adm. 114.

⁵ *McGinnis v. The Pontiac*, 1 Newb. Adm. 130.

⁶ *Montgomery v. The T. P. Leathers*, 1 Newb. Adm. 421; *The Ottawa*, 1 Low. 274.

who take part in the service, as in stripping and unloading a stranded vessel, they do not have separate liens on the several articles saved by each, but all are entitled to be paid out of the property saved.¹

DERELICT PROPERTY.—The amount of salvage to be allowed in derelict cases is governed by the same principles that apply in other salvage cases, and is fixed in the discretion of the court according to the circumstances of each case; that is, according to the danger to the property, its value, the risk to life, the skill and labor bestowed, and the duration of the service.² And the amount so estimated has generally varied from two-fifths to one-half of the value of the property saved.³

Two reasons are recognized for allowing a liberal reward in cases of derelict property; first, that the property having been abandoned or lost, it is not for its owner to complain of the reward paid to strangers who restore it; second, protection of the public against danger from the derelict property. Where a brig was abandoned in near proximity to the entrance to a great seaport, and in the track of vessels of every description inward and outward bound; so that, by being left floating, with some sails still up, and with no one on board to set her lights, to keep her on her course, or to answer or give hails, the court denominated her a dangerous thing; and that, for taking in charge and saving a wreck so situated, the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk, and the deviation of any vessel from any voyage, in order to supply the wreck with a crew, and to make her presence safe.⁴ The fact that a derelict vessel might have been saved without the interposition of the salvors may be taken into account in the determination of the compensation, but cannot deprive salvors of all claim.⁵

¹ The Albion Lincoln, 2 Low. 71.

² Post v. Jones, 19 How. 150; The Georgiana, 1 Low. 91.

³ Barrels of Oil, 1 Sprague, 91; Sprague v. Barrels of Flour, 2 Story, 195; The John E. Clayton, 4 Blatch. 372; Hindry v. The Priscilla, Bee, Adm. 1; Bell v. The Ann, 2 Pet. Adm. 278; The Elizabeth and Jane, 1 Ware, 33; The Boston, 1 Sumn.

328; The Charles Henry and Cargo, 1 Ben. 8; The Henry Ewbank, 1 Sumn. 400; Taylor v. The Cato, 1 Pet. Adm. 48; The John Wurts, Olcott, Adm. 462; The Georgiana, 1 Low. 91; The Cayenne, 2 Abb. N. S. 42.

⁴ The Anna, 6 Ben. 166.

⁵ Holmes v. The Joseph C. Griggs and Cargo, 1 Ben. 81.

FORFEITURE OF SALVAGE COMPENSATION BY MISCONDUCT.—It is a general rule of admiralty to deny compensation to salvors, no matter how meritorious their conduct may have been, if they are guilty of misconduct or bad faith. And, where there is such forfeiture, the shares forfeited do not accrue to co-salvors, to increase their shares, but are reserved for the owners of the property saved.¹ Embezzlement of any part of the property works a forfeiture.² So will neglect to inform the salvor beforehand of an imminent and secret danger, known to the salvor, and against which he was able to warn her. But he may be entitled to compensation for services performed, although his conduct has been such as to forfeit a salvage remuneration.³ Where the captain and owners had concealed a part of the goods saved, their share of the salvage was declared forfeited to the owner of the vessel saved.⁴ And if persons interfere unnecessarily with wrecked property, which is being saved under a contract with the owners, such meddlers cannot claim as salvors, although they bring the property into port.⁵ And making false representations for the purpose of exaggerating the danger and hardship of the service to enhance the reward, spoliation, smuggling, obtrusion of unnecessary service, or refusal to accept necessary or needful assistance, will be punished by total or partial forfeiture of compensation.⁶

¹ *The Rising Sun*, 1 Ware, 385. See *McGregor v. Ball*, 4 La. Ann. 289.

² *Id.*

³ *American Ins. Co. v. Johnson*, Blatchf. & H. Adm. 9.

⁴ *Flinn v. The Leander*, 1 Bee,

Adm. 260; *Mason v. The Blaireau*, 2 Cranch, 239; *The Boston*, 1 Sumn. 328.

⁵ *A Quantity of Iron*, 2 Sprague, 51; *Hand v. The Elvira*, Gilp. 60.

⁶ *Harley v. Gawley*, 2 Sawyer, 7, 11.

CHAPTER VII.

SURETYSHIP.

SECTION 1.

CREDITOR AGAINST SURETY.

The contract of suretyship — There is no peculiar rule for its interpretation — The obligation of a surety is confined strictly to his contract — Guaranties — Discharge or reduction of a surety's liability by act of the creditor — Surety's right to defend between the principal parties.

THE CONTRACT OF SURETYSHIP.— As the contract of a surety is to answer for the debt, default or miscarriage of another, either by joining in the undertaking of the principal, or by a collateral contract, the amount recoverable by the creditor or promisee against the surety is a primary inquiry; then arises the consequent right of the surety, who has been compelled to pay, against his principal for reimbursement; and his right against co-sureties, if any, for contribution.

Against a surety the damages recoverable are the amount of the debt which he has undertaken to pay, or the loss he has consented to be answerable for, and interest, if the debt bears interest, or if interest is chargeable, on the principles by which interest is imposed as damages for default in payment. When a surety enters into the contract with the principal, undertaking with him to perform it, the consideration received by the principal supports the contract as to both;¹ and the agreement of the surety cannot extend further than that of the principal.² And then, as well as when he afterwards assumes the same obligation upon a new consideration, he is bound to the same measure of responsibility; that is, the same rule of damages necessarily applies to both. In respect to the other party to the contract, they are equally principals in extent of liability.³

A surety undertakes for another; the debt or damages sought

¹ Dillingham v. Jenkins, 7 Sm. & Kirby v. Studebaker, 15 Ind. 45; M. 479. Castner v. Slater, 59 Me. 212; Monk

² Ellis v. Bibb, 2 Stew. 63.

v. Beal, 2 Allen, 585.

³ McIntosh v. Likens, 25 Iowa, 555;

to be recovered result from the act or omission of that other; the surety is only under obligation to pay or make compensation by his contract of suretyship; his liability thus originates, and has no greater scope or extent than that contract, properly interpreted, provides for. Hence, not unfrequently the amount recoverable from him will be materially affected by the construction which it receives.

THERE IS NO PECULIAR RULE FOR INTERPRETATION OF A SURETY'S CONTRACT.—A surety's contract is to be interpreted like other contracts. In guaranties, letters of credit, and other obligations of sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances, and to forward the purposes for which it is made.¹ In many early cases in England and in this country, it was held that such contracts should be construed strictly.² In *Russell v. Clark*,³ Marshall, C. J., said: "The law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man on the credit of another not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume."

But in other, and especially the later cases, a more liberal rule is laid down. In *Mason v. Pritchard*,⁴ the king's bench declared that the words of the guarantor were to be taken as strongly against the party giving the guaranty as the sense of them would admit of. In *Hargreave v. Smee*,⁵ Tindal, C. J.,

¹ *Belloni v. Freeborn*, 63 N. Y. 383; *Locke v. McVean*, 33 Mich. 473; *Gates v. McKee*, 13 N. Y. 232; *Lee v. Dick*, 10 Pet. 482; *Crist v. Burlingame*, 62 Barb. 351; *Reed v. Fish*, 59 Me. 358; *Bailey v. Larchar*, 5 R. I. 530; *Boehne v. Murphy*, 46 Mo. 57; *Brown v. Haven*, 37 Vt. 439.

² *Nicholson v. Paget*, 1 Cr. & M. 48;

Melville v. Hayden, 3 B. & Ald. 593; *Cremer v. Higginson*, 1 Mason, 323; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Mauran v. Bullus*, 16 Pet. 528.

³ 7 Cranch, 69, 90.

⁴ 13 East, 227.

⁵ 6 Bing. 244.

said: "The question is, what is the fair import to be collected from the language used in this guaranty. The words employed are the words of the defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the court puts on any other instrument. With regard to other instruments, the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." In *Douglass v. Reynolds*,¹ Story, J., after quoting in part the foregoing extract from the opinion of Judge Marshall in *Russell v. Clark*, said: "On the other hand, as these instruments (commercial guaranties) are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in *Drummond v. Prestman*² as a rule in expounding them, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit.³ And the same rule was adopted in the king's bench in *Mason v. Pritchard*."⁴ In *Lee v. Dick*,⁵ Thompson, J., said a guaranty is a commercial instrument and ought to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety.⁶ As to commercial guaranties, the language of Mr. Justice Story in *Lawrence v. McCalmont*⁷ has been quoted with approbation,⁸ and probably expresses the rule of construction now generally accepted. He said: "We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purpose to which it is applied. We should never forget that letters of guaranty are

¹ 7 Pet. 113.² 12 Wheat. 515.³ Fell on Guaranty, ch. 5, p. 129.⁴ 12 East, 227.⁵ 10 Pet. 482.⁶ *Mayer v. Isaac*, 6 M. & W. 605.⁷ 2 How. 426.⁸ *Gates v. McKee*, 13 N. Y. 232.

commercial instruments, generally drawn by merchants, in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. . . . Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantor had advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which another party is misled to his injury."

The question which frequently arises on such instruments is whether the guaranty is a continuing one, or whether it is exhausted by the first transaction under it. The language of guaranties is so various in different cases, and the accompanying circumstances so dissimilar, that each case must depend largely on its own facts. The conflict that is manifest between some cases that very nearly resemble each other, plainly results from the application in one instance of a liberal rule of interpretation in resolving doubts in respect to the intention of the parties, and in another a strict rule; by resolving the doubt in one case against the guarantor and in the other in his favor.¹

¹ Compare *Grant v. Ridsdale*, 2 Har. & J. 186; *Rapelye v. Bailey*, 5 Conn. 149; *Bent v. Hartshorn*, 1 Met. 24; *Drummond v. Prestman*, 12 Wheat. 515; *Boyce v. Ewart*, 1 Rice, 126; *Bastow v. Bennett*, 3 Camp. 220; *Merle v. Wells*, 2 Camp. 413; *Nicholson v. Paget*, 1 Cr. & M. 48; *Lee v. Dick*, 10 Pet. 482; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Fellows v. Prentiss*, 3 Denio, 512; *Douglass v. Reynolds*, 7 Pet. 113; *Mayer v. Isaac*, 6 M. & W. 605; *Mason v. Pritchard*, 12 East, 227; *Hargreave v. Smee*, 6 Bing. 244; *Melville v. Hayden*, 3 B.

& Ald. 593; *Evans v. Whyte*, 5 Bing. 485; *Glyn v. Hertel*, 8 Taunt. 208; *Cremer v. Higginson*, 1 Mason, 323; *Gates v. McKee*, 13 N. Y. 232; *Bell v. Bruen*, 1 How. 169; *Haigh v. Brooks*, 10 Ad. & El. 309; *Martin v. Wright*, 6 Q. B. 917; *Hitchcock v. Humphry*, 5 M. & G. 560; *Allan v. Kenning*, 9 Bing. 618; *Clark v. Burdett*, 2 Hall, 197; *Crist v. Burlingame*, 62 Barb. 351; *Boehne v. Murphy*, 46 Mo. 57; *Bailey v. Larchar*, 5 R. I. 530; *Adams v. Clark*, Brayton, 196; *Washington Bank v. Shurtleff*, 4 Met. 30; *Williamson v. Chiles*, 5 Ired. 244.

THE OBLIGATION OF A SURETY IS CONFINED STRICTLY TO HIS CONTRACT.—In this sense it is construed strictly. He is not liable on an implied engagement where a party contracting for his own interest might be; and he has a right to insist upon the exact performance of any condition for which he has stipulated, whether others would consider it material or not.¹ “Nothing can be clearer,” says Story, J.,² “both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand on the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases . . . where persons have been bound for the good conduct of clerks of merchants and others illustrates this position. The whole series of them, from *Lord Arlington v. Mericke*³ down to *Pearsall v. Summersett*,⁴ proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners by name, it has constantly been held that the undertaking stopped upon the admission of a new partner. And the only case, that of *Barclay v. Lucas*,⁵ in which a more extensive construction is supposed to have been given, confirms the general rule; for that turned upon the circumstance that the security was given to the house as a banking house; and thence an intention was inferred that the parties intended to cover all losses, notwithstanding a change of partners in the house.”

The obligation is not to be extended to any other subject, to any other person, to any other period of time, than is expressed

¹ *Yates v. McKee*, 13 N. Y. 232;
Chatham v. McCrea, 12 U. C. C. P.
 352.

² *Miller v. Stewart*, 9 Wheat. 680.

³ 2 Saund. 412.

⁴ 4 Taunt. 593.

⁵ 1 T. R. 291, note a.

or necessarily included in it.¹ Where debt was brought on a bond for the faithful performance of official duty by a deputy collector of direct taxes in eight townships, and the instrument of appointment was referred to in the bond, it was held that the alteration of the instrument so as to include another township, without the consent of the sureties, discharged them from responsibility for moneys subsequently collected by the principal.² So where J, being desirous of purchasing goods of the plaintiff on credit, procured a letter of guaranty from the defendant to the plaintiff, by which the defendant promised to be surety for the amount of goods, to be paid January 1, 1840; and the plaintiff sold the goods to J, and took his note, payable December 25, 1839, it was held that the defendant was not bound, although the plaintiff did not require payment from J until after January 1, 1840.³

A written guaranty "of the payment of all powder" consigned to a certain person for sale, will not cover a sale to the consignee of the powder remaining unsold upon closing the account between the consignor and himself; and it cannot be controlled by evidence of a custom among commission merchants, known to the guarantor, to purchase goods remaining unsold under such circumstances, and to treat such a transaction as a sale to a third person.⁴ It was remarked by the court, that the defendant might have been willing to guaranty the fidelity

¹ *Burge on Suretyship*, ch. 3, p. 40; *Mercer Co. v. Coovert*, 6 W. & S. 70; *Grant v. Smith*, 46 N. Y. 93; *Wayman v. Hoag*, 14 Barb. 232; *Hollond v. Teed*, 7 Hare, 50; *McGovney v. State*, 20 Ohio, 93; *Bill v. Barker*, 16 Gray, 62; *Backhouse v. Hall*, 6 B. & S. 507; *State v. Boon*, 44 Mo. 254; *Simson v. Cooke*, 8 Moore, 588; *Fisher v. Cutter*, 20 Mo. 206; *Dunlop v. Gordon*, 10 La. Ann. 243; *State v. Medary*, 17 Ohio, 554; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Glyn v. Hertel*, 8 Taunt. 208; *Supervisors v. Kaime*, 39 Wis. 468; *Chelmsford Co. v. Demerest*, 7 Gray, 1; *Dover v. Twombly*, 42 N. H. 59; *Vivian v. Otis*, 24 Wis. 518; *Leeds v. Dunn*, 10

N. Y. 469; *Beckhead v. George*, 8 Hill, 635; *McCluskey v. Cromwell*, 11 N. Y. 593; *Connecticut, etc. Ins. Co. v. Bowler*, 1 Holmes, 263; *United States v. Cheeseman*, 3 Sawyer, 424; *Kelly v. Kellogg*, 79 Ill. 477; *Dunlap v. Wilson S. M. Co.* 81 Ill. 496. See *Richards v. Storey*, 114 Mass. 101; *Andre v. Fitzhugh*, 18 Mich. 93; *Saunders v. Stevens*, 116 Mass. 133; *Leonard v. Speidel*, 104 Mass. 356; *Tucker v. White*, 5 Allen, 322.

² *Miller v. Stewart*, *supra*.

³ *Walrath v. Thompson*, 2 Comst. 185; *S. C.* 6 Hill, 540; 4 Hill, 200.

⁴ *Carkin v. Savory*, 14 Gray, 528. See *Wilson v. Edwards*, 6 Lans. 134.

of the factor to account for actual sales of goods consigned, and with the right to return those unsold, and yet have been unwilling to assume the responsibility of absolute purchases by him, to be retained whether he could sell them or not.

One who has become guarantor for such notes of a specified description as another should give in pursuance of a written contract, cannot by virtue thereof be held liable for notes differing materially from those which the contract provided for. Thus, where the contract, the performance of which is guaranteed, provides for notes at four months without interest, to be renewed, if desired, for sixty days at eight per cent., the guarantor is not holden for notes running six months, with interest for four months at seven per cent. and thereafter at eight per cent.; nor for six-month notes with interest at eight per cent. after four months; the variance is a substantial one.¹

The sureties upon the bond of an assignee given pursuant to the statute in reference to voluntary assignments for the benefit of creditors, are not liable for the failure of their principal to account for the assets in his hands as required by a judgment in favor of creditors declaring the assignment void as to them, and directing the assignee to pay over the assets and the avails thereof in his hands, to be applied in satisfaction of their claims.² Where the surety's contract embraced the payment of laborers employed by the principal or his agent, it did not extend to laborers employed by his sub-contractor.³ The bond for the faithful discharge of duty by a life insurance agent was conditioned that he should "receive and forward applications for, and deliver policies, and receive and forward premiums upon the same, within the city of Davenport." He received the premiums of certain parties who had been insured in Davenport by a former agent of the company, but who had since removed therefrom; and it was held that the failure to pay over to the company such moneys was not a breach of the bond subjecting the sureties to liability.⁴ The defendant guaranteed payment to the plaintiff to the extent of 50% for gold he might supply to E, a working goldsmith, for the purpose of carrying

¹ *Locke v. McVean*, 33 Mich. 473.

³ *McCluskey v. Cromwell*, 11 N. Y.

² *People v. Chalmers*, 60 N. Y. 154.

593.

⁴ *Crapo v. Brown*, 40 Iowa, 487.

on his business. The plaintiff discounted bills for the goldsmith, and gave him for them partly gold and partly money, deducting from the gold the usual charge for credit for the length of time the bills had to run, and from the money, interest at the same rate. E did not indorse the bills, and the gold was applied by him to the purposes of his business. The bills were dishonored and suit was brought on the guaranty; it was held that the gold so advanced was not supplied within the meaning of the guaranty.¹

Where a surety signed a note with his principal payable to a bank ten days after date, it was held that the surety was not liable on it for moneys advanced by the bank after the note was due; that it was not a continuing security.² But where the makers of a note, signed by them for the accommodation of others, payable to a bank on demand, deliver it to the accommodated party, it is an inference of law, in the absence of further authority or restriction, that the latter may put it to any use of which it is capable, and it may be pledged by him for future loans as a continuing guaranty, until the sureties terminate their responsibility by notice.³ In such a case, the principals delivered the note to the payee bank with a written memorandum therein that it was left as collateral security for all liability incurred by them, and evidence was held admissible, for the purpose of arriving at the intent of the parties in the hypothecation, that they were at the time under no liability to the bank; that in view of that fact the parties intended that the note should be security for future advances, and that the words "*all liability*," in the memorandum, import a continuing guaranty.⁴ "There was no contract," said Mr. Justice Selden, "even in form, by the makers of the note, with any party except the bank; and that contract was made, not when the note was signed, but when it was delivered to the bank. Of course, then, the terms agreed upon, when the deposit was made, were terms agreed upon between the bank and the makers of the note, provided the agent did not exceed his authority; and as

¹ Evans v. Whyte, 5 Bing. 485.

³ Agawam Bank v. Straver, 18 N.

² Bank of St. Albans v. Smith, 30 Vt. 148.

Y. 502.

⁴ Id. See Weed v. Clark, 4 Sandf. 31.

the note acquired its validity at that time, and by virtue of those terms, the whole arrangement is, upon well settled principles, to be taken together, as constituting but a single contract. Consequently, the absolute terms of the note are to be regarded as modified by the conditions of the simultaneous agreement to hold it merely as collateral to the loans to be made upon the faith of it. Although payable on demand, no suit could be maintained upon it until the debt for which it was held as security had become due; and no more could be recovered than the amount of such debt."

In a contract with the war department to build a fort, it was agreed that the advances should be made in part payment of the work, for materials delivered with the invoice at the fort, and pronounced by the engineer to be of proper quality, and at the end of each month for the work performed. After large advances had been made, the contract was assigned, and the assignee gave bond, with sureties, to account for the advances made under and by virtue of the contract; it was held that the sureties were entitled to the benefit of all limitations provided in the contract, and were not answerable for advances made when such limitations were dispensed with, whether such advances were made before or after the making of the bond, it not appearing that the sureties knew such advances had been made.¹

It is apparent, from the illustrations which have been given, and many others that might be cited, that the plaintiff must bring his case very strictly within the undertaking of the surety, and cannot recover beyond it. Thus, the plaintiff and S entered into a contract that S should perform certain work at a fixed sum, receiving, from time to time, payment for three-fourths of the work done; the remaining one-fourth to be paid a month after the completion of the whole; if S should fail to complete the works, the plaintiff was to employ others and deduct the expenses from the sum payable to him. The defendant was surety for the performance of this contract by S. S abandoned the contract when partly performed. The plaintiff, at the request of S, had advanced him a sum which exceeded

¹ United States v. Tillotson, 1 Paine, 305.

the whole cost of the works then accomplished, but was less than the contract price. The plaintiff then had the works completed, at a cost which, added to the price of the work actually done, was less than the contract price, but, added to the money which he had advanced, was more than that sum. He sued the defendant on his guaranty, and it was held that he was only entitled to nominal damages, as the loss had arisen from his own act in advancing more money than he ought to have done, not from the refusal of S to go on with the works.¹

A surety who guaranties the punctual payment of the interest on a money bond, which has six years and a half to run, and on which interest is payable semi-annually, can only be made liable for such interest as accrues before the bond becomes due.² In such a case, Church, C. J., said: "The claim against the defendant is based upon the guaranty, which is in the following words: 'For value received, I guaranty the punctual payment of the interest on the within bond, and will pay the interest on demand in default of its payment by W.' The question is, whether the defendant, as guarantor, is liable for anything beyond the interest up to the time when the principal became due, according to the terms of the bond. This must depend upon the construction of the language of the instrument, viewed in the light of circumstances existing at the time it was made. In ascertaining the meaning of the language used, the same rules of construction are applicable to contracts of suretyship as to other contracts. When the true signification of the contract is thus ascertained, the surety or guarantor has a right to insist that his liability shall not be extended beyond its precise terms.³ What, then, is the true meaning of this contract? W agreed to pay the principal in six years and a half, and, in the meantime, to pay semi-annual interest on specific days. The defendant is presumed to have seen and understood the exact agreement of W, and to have executed the guaranty in contemplation of its performance by him. He has a right to limit his liability, and he did limit it. He did not guaranty the

¹ *Warne v. Calvert*, 7 Ad. & E. 143; *Wood's Mayne on Damages*, 417.

² *Hamilton v. Van Rensselaer*, 43 N. Y. 244.

³ *Gates v. McKee*, 3 Kern. 232, and cases cited.

payment of the principal, but only the 'punctual payment of the interest on the within bond.' What interest? Clearly, the interest payable according to the terms of the bond, and that only. No other interest was specified or alluded to, and none other was contemplated by the defendant, as he contracted, we must presume, with reference to the payment of the principal when due by W. He neither agreed to pay the principal, nor to be liable for the consequences of its non-payment. . . . The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include interest after, as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer, that, by strict legal rules, interest, as such, cannot be recovered after default in the payment of the principal, and that such interest is not, therefore, within the language of the contract."¹

Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the whole period of actual occupancy was brought against both, it was held that the other lessee was not estopped to show that he signed the lease in the character of a surety for the term specified, without having in fact occupied the premises at any time; it was held that he was not liable for the rent after the time mentioned in the writing, the holding over being as to him no continuance of the lease.² But where the premises are leased for a certain term with the privilege to the tenant to continue in possession for another succeeding term, and the tenant avails himself of the privilege, the guaranty of a third person for the payment of the rent is a continuing guaranty during the

¹ Melick v. Knox, 44 N. Y. 676, is to the same effect. There is a remarkable discrepancy between Hamilton v. Van Rensselaer, in the supreme court, as reported in 28 How. Pr. 192, and 43 Barb. 117, and in the court of appeals, as reported in 43 N. Y. 244. In the former the facts and the law are thus stated: A

surety who guaranties the punctual payment of the interest on a money bond, *and there is no stipulation for interest in the bond*, can only be made liable for such interest as accrues by way of damages after the bond becomes due.

² Kennebec Bank v. Turner, 3 Greenlf. 42.

possession of the tenant for such extended term.¹ The cases are very numerous on the point that the responsibility of a surety is confined strictly to his undertaking. The cases cited below may be found worth consulting by the curious reader who desires to pursue the subject.²

Where the case is brought within the surety's contract, he is only liable for such actual damages as the plaintiff shows.³ A defendant's covenant that the debts of a certain firm, into which the plaintiff was about to enter as a partner, did not exceed a certain sum; and that if they did, the defendant would pay, on demand of the plaintiff, the amount by which they exceeded that sum, was held not to be a covenant for liquidated damages, but a contract to indemnify the plaintiff as to any loss he might suffer from an erroneous statement of the debts; and that it was for the jury to consider to what extent his position had been altered by reason of the defendant's breach of covenant.⁴

GUARANTIES.—A guaranty imports a contract collateral to the contract debt or obligation of another, except where the word is used in the sense of warranty. This collateral contract may

¹ *Dufau v. Wright*, 25 Wend. 636; *Decker v. Gaylord*, 8 Hun, 110; *Kaigh v. Fuller*, 14 N. J. Eq. 419; *Deblois v. Earl*, 7 R. I. 26.

² *Taylor v. Wetmore*, 10 Ohio, 490; *Blecker v. Hyde*, 3 McLean, 279; *Barns v. Burrow*, 67 N. Y. 39; *Sollee v. Mengy*, 1 Bailey L. 620; *Michigan State Bank v. Peck*, 28 Vt. 200; *Bussier v. Chew*, 5 Phil. 70; *Allison v. Rutledge*, 5 Yerg. 193; *Johnson v. Brown*, 51 Ga. 498; *Stevenson v. McLean*, 11 U. C. C. P. 208; *Penoyer v. Watson*, 16 John. 100; *Walsh v. Bailie*, 10 John. 180; *Parham Sewing M. Co. v. Brock*, 113 Mass. 194; *Smith v. Montgomery*, 3 Tex. 199; *Montefiore v. Lloyd*, 15 C. B. N. S. 203; 33 L. C. P. 49; *London Ass. Co. v. Bald*, 6 Q. B. 514; *Bill v. Barker*, 16 Gray, 62; *Manhattan Gas Light Co. v. Ely*, 39 Barb. 174; *Hollond v. Teed*, 7 Hare, 50; *Spiers v. Houston*,

4 Bligh, N. S. 515; *Wright v. Russell*, 2 W. Bl. 934; *Mackay v. Dodge*, 5 Ala. 388; *Grant v. Smith*, 46 N. Y. 93; *Barnett v. Smith*, 17 Ill. 565; *Sterns v. Marks*, 35 Barb. 565; *Simson v. Cooke*, 8 Moore, 588; *Wadsworth v. Allen*, 8 Gratt. 174; *Palmer v. Bagg*, 56 N. Y. 523; *Dry v. Davy*, 10 Ad. & El. 30; *Union Bank v. Costen*, 3 N. Y. 203; *Lang v. Pike*, 27 Ohio St. 498; *Hood v. Mathis*, 21 Mo. 308; *Reed v. Fish*, 59 Me. 358; *Boehne v. Murphy*, 46 Mo. 57; *Dick v. Crowder*, 10 Sm. & M. 71; *Dobbin v. Bradley*, 17 Wend. 422; *Tucker v. White*, 5 Allen, 323; *Richard v. Storer*, 114 Mass. 101; *Sanderson v. Stevens*, 116 Mass. 133; *Clark v. Sawyer*, 121 Mass. 224.

³ *King v. Norman*, 4 C. B. 884.

⁴ *Walker v. Broadhurst*, 8 Exch. 889. See *Mauran v. Bullus*, 16 Pet. 528.

embrace part only of the debt or obligation of the principal,¹ or the whole of it; and the damages for a breach of it will depend upon its nature and extent. If it be a full guaranty of payment or performance, as it is owing by the principal, then the guarantor, when in default, must respond by the same measure and standard as the principal.²

A continuing guaranty may be determined by notice from the surety, where it is in the nature of a continuing offer, and only binding as far as acted upon.³ And where performance of a contract is guaranteed, the surety may, after default by his principal which would justify the other party in terminating it, require that it be terminated, and the claim against himself confined to damages then recoverable.⁴ A guarantor of pay-

¹Skinner v. Valentine, 59 N. Y. 473; Melick v. Kuox, 44 N. Y. 676; Hamilton v. Van Rensselaer, 43 N. Y. 244.

²Oakley v. Boorman, 21 Wend. 583; Gage v. Lewis, 63 Ill. 604; Smith v. Rogers, 14 Ind. 224; Furnas v. Durgin, 119 Mass. 500; Fletcher v. Derrickson, 3 Bosw. 181; Skinner v. Valentine, 59 N. Y. 473; Douglass v. Howland, 24 Wend. 35; Gammel v. Paramore, 53 Ga. 54; Tutor v. Thayer, 47 How. Pr. 180; Gutta Percha, etc. Co. v. Benedict, 37 N. Y. Supr. Ct. 430; Upham v. Prince, 12 Mass. 14; Cooper v. Page, 24 Me. 73; More v. Howland, 4 Denio, 264; Carew v. Denny, 8 Pick. 363; Blanchard v. Wood, 26 Me. 358; Gist v. Drakely, 2 Gill, 330; Cobb v. Little, 2 Greenlf. 261; Carter v. McGehee, Phill. (N. C.) L. 431; Bean v. Arnold, 16 Me. 251; Campbell v. Butler, 14 John. 349; Allen v. Brightmire, 20 John. 365; James v. Long, 63 N. C. 218; Ellmaker v. Franklin Ins. Co. 5 Pa. St. 183; Remsen v. Graves, 41 N. Y. 471; Hendricks v. Banning, 7 Minn. 32; Samson v. Thornton, 3 Met. 275; Tenny v. Prince, 4 Pick. 385; Josselyn v. Ames, 3 Mass. 274; Ulen v. Kittridge, 7 Mass. 233;

White v. Howland, 9 Mass. 314; Moeis v. Bird, 11 Mass. 436; Nelson v. Dubois, 13 John. 175; Harrick v. Carman, 12 John. 159; Hunt v. Adams, 5 Mass. 358; Sumner v. Gay, 4 Pick. 311; Baker v. Briggs, 8 Pick. 122.

³Offord v. Davies, 12 C. B. N. S. 748; Jordan v. Dobbins, 122 Mass. 168. See Brandt on Surety & G. §§ 113, 114.

⁴Hunt v. Roberts, 45 N. Y. 691. In this case the defendant guaranteed the performance on the part of C of a building contract made by C with the plaintiffs, wherein the plaintiffs agreed to perform the work by the 15th of October, and C to furnish materials and pay a certain sum. After October 15th, the work being unfinished, the defendant gave notice to the plaintiffs that if they did not complete the work before the 1st of November, he would not be responsible as guarantor thereafter. The plaintiffs kept on until June following, being delayed by C's failure to supply materials. The defendant, by an arrangement with a third person, and to which the plaintiffs were not a party, had assumed C's obliga-

ment is, like the principal, liable to interest from the time the money became due;¹ and for attorney fees when stipulated for in the contract.² So where the agreement guarantied provides for stipulated damages in case of the principal's default, the guarantor is liable by his guaranty for those damages.³

In case of a guaranty of the amount due on a note, and not a guaranty of collectibility, the damages are what the plaintiff has lost by the breach; and this loss is the value of a judgment against the maker, if one had been obtained; and if it appear that the maker was solvent and prevented a recovery of judgment by proving payment, the measure of damages is the amount which purports to be due on the note.⁴

A guaranty against any loss which might occur by reason of a sale of goods, which, by stipulation between the principal parties, are to be sold within ninety days, will not render the guarantor liable, if, by agreement of the parties, the goods are not sold within that time, and the time for the sale is fixed at a subsequent date.⁵ But where the guaranty was of the payment of any purchase of bagging and rope between its date and a stated date in the future, it was held to extend to purchases upon a reasonable credit made between those dates, although the time of payment was not to arrive until after that day.⁶

A contract was made for furnishing a steam engine, and a surety in behalf of the manufacturer guarantied the performance of that contract; and in case of non-performance thereof to refund all sums of money the other party might pay or advance thereon with interest. It was held that the contract was

tions, and after November 1st urged the plaintiffs to perform and himself supplied the material, but stated to them that he would not be personally responsible. It was held, in an action on the contract of guaranty, that the effect of the notice was an extension of time for performance, and continued the defendant's liability, as guarantor, to November 1st only; and his liability was limited to the debt and damages which the plaintiffs were en-

titled to claim at that time. See *Estate of De Silver*, 9 Phila. 302; *Pleasanton's Appeal*, 75 Pa. St. 344.

¹ *Gammel v. Paramore*, 58 Ga. 54; *Gutta Percha, etc. Co. v. Benedict*, 37 N. Y. Super. Ct. 430.

² *First Nat. Bank v. Breese*, 39 Iowa, 640.

³ *Gridley v. Capen*, 72 Ill. 11.

⁴ *Head v. Green*, 5 Biss. 311.

⁵ *Fisher v. Cutler*, 20 Mo. 206.

⁶ *Louisville M. Co. v. Welch*, 10 How. U. S. 461.

not in the alternative, but consisted of two terms; one that the principals should perform their engagement, not merely by the delivery of some machinery, but of such machinery as the contract required; the other that if there should be a non-performance, whether excusable or not, the money advanced on the contract should be refunded to the extent that the principals were liable. The machinery delivered was imperfect so as to constitute a breach of the warranty in the contract; and it was held that the surety was liable to such damages as would enable the plaintiffs to supply the deficiency, and that the jury were not required to assume that the contract price was the full value of the machinery.¹

In an action on a guaranty that stock should be worth \$700, market value, within one year from date, it was held that the true measure of damages was the difference between \$700 and \$500, the latter sum being the highest market value reached in the market during the year, and not the difference between \$700 and \$300, the latter being the market value at the end of the year.² The defendant sold to a plaintiff certain shares of railroad stock, with a guaranty that such stock should yield annually six per cent. dividends for the space of three years. In an action on the guaranty, it was held that the true construction of the guaranty was that the stock should be equal in value to stock yielding annually a dividend of six per cent. And that the measure of damages, in this action, was the difference between the actual value of the stock transferred and a stock which should yield six per cent. annually for the next three years following the transfer.³

There is much conflict as to the effect of an indorsement by a third person in blank upon a negotiable note at its inception; and also as to the effect of such an indorsement made afterwards. In New York, the contract implied, according to the later decisions, is that of an indorser; and parol evidence cannot be admitted to modify it.⁴ In the decisive case⁵ which settled the

¹ Benjamin v. Hillard, 23 How. U. S. 149.

² Woodward v. Powers, 105 Mass. 108.

³ Struthers v. Clark, 30 Pa. St.

210; Morris v. Barrett, 24 Ohio St. 201.

⁴ Seabury v. Hungerford, 2 Hill, 80; Hall v. Newcomb, 7 Hill, 416; Spies v. Gilmore, 1 Comst. 321.

⁵ Hall v. Newcomb, *supra*.

doctrine in that state, the chancellor said: "I fully concur in the opinion expressed by Mr. Justice Bronson,¹ that where a man writes his name in blank upon the back of a promissory note, he only agrees that he will pay the note to the holder on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he has indorsed the paper to enable the maker to raise money on it does not change the nature of his legal liability as indorser, where the note is in the hands of a bona fide holder for a good consideration. . . . And for the courts to allow proof by parol to charge a mere surety beyond the legal effect of his written blank indorsement on such paper, would bring them in direct conflict with the provisions of the statute of frauds."

In Connecticut, the contract which the law implies, *prima facie*, from a blank indorsement of a promissory note, whether negotiable or not, is that it is due and payable according to its terms; that the maker shall be able to pay, and that it is collectible by the use of diligence.² But the blank indorsement is only *prima facie* evidence of such contract; it is competent between the parties to the indorsement to prove by parol evidence the agreement which was in fact made at the time of the indorsement.³ Where, however, there is an express guaranty of payment, it is held to be an absolute engagement, on the part of the guarantor, that the note shall be paid within the time specified therefor by the maker or himself.⁴ But, generally, the stranger who indorses before delivery is liable as an original promisor, or as a guarantor;⁵ and one, not a holder, indorsing

¹In *Seabury v. Hungerford*, 2 Hill, 80.

²*Perkins v. Catlin*, 11 Conn. 213; *Laffin v. Pomeroy*, 11 Conn. 440; *Huntington v. Harvey*, 4 Conn. 124; *Bond v. Storrs*, 13 Conn. 412; *Castle v. Candee*, 16 Conn. 223; *Clark v. Merriam*, 25 Conn. 576; *Ranson v. Sherwood*, 26 Conn. 437.

³*Id.*; *Beckwith v. Angell*, 6 Conn. 315.

⁴*Breed v. Hillhouse*, 7 Conn. 522. But see *Sage v. Wilcox*, 6 Cow. 81.

⁵*Samson v. Thornton*, 3 Met. 275; *Hunt v. Adams*, 5 Mass. 358;

Ulen v. Kittridge, 7 Mass. 233; *White v. Howland*, 9 Mass. 314; *Rey v. Simpson*, 22 How. U. S. 341; *Burton v. Hansford*, 10 W. Va. 470; *Boynton v. Pierce*, 79 Ill. 145; *Underwood v. Hossack*, 33 Ill. 208; *Carroll v. Weld*, 13 Ill. 682; *White v. Weaver*, 41 Ill. 409; *Champion v. Griffith*, 13 Ohio, 238; *Seymour v. Mickey*, 15 Ohio St. 575; *Van Doren v. Tjader*, 1 Nev. 380; *Fuller v. Scott*, 8 Kan. 25; *Chandler v. Westfall*, 30 Tex. 475; *Horton v. Manning*, 37 Tex. 23; *Pahlman v. Taylor*, 75 Ill. 629; *Clapp v. Rice*, 13 Gray,

afterwards, a guarantor.¹ It is also generally held that a blank signature or indorsement, in pursuance of a special undertaking, authorizes the real agreement to be written over the name afterwards by the holder; and that an agreement so filled up will satisfy the statute of frauds.² Whether written or not, it is open to proof;³ but in a case within the statute of frauds, it must be written.⁴

A contract of suretyship may arise in various ways in connection with commercial paper. The maker of a note and the acceptor of a bill are the primary debtors thereon to the holder for whose benefit they are made, or his assigns. They may, as they often do, assume that liability for the accommodation of some other party to the paper, or a third person; they thus become sureties for the person accommodated.⁵ In his hands, as holder, the paper would be satisfied; for being ultimately liable to the maker or acceptor, who is ostensibly bound as primary debtor on the paper, for anything he may have to pay, such holder is not permitted to recover from him; the claim of such holder on the paper is for precisely the same sum that the accommodation maker or acceptor on payment would be entitled to demand from him, as their principal, by way of indemnity; and, to prevent circuitry of action, when he becomes the owner of the paper it is canceled.⁶ Thus, a note payable to a firm was signed by one member of the firm, and two other persons as sureties; in an action by the other member of the firm against the sureties, it was held that, as the member of the firm signing the note was on the face of it entitled to one half of

403; *Schmidt v. Schmaelter*, 45 Mo. 502; *Chaffee v. Jones*, 19 Pick. 260; *Martin v. Boyd*, 11 N. H. 385; *Chaffee v. Memphis, etc. R. R. Co.* 64 Mo. 193.

¹*Tenney v. Prince*, 4 Pick. 385; *Thomas v. Jennings*, 5 Sm. & M. 627; *Rey v. Simpson*, 22 Howard U. S. 341; *Whiton v. Mears*, 11 Met. 563; *Killian v. Ashley*, 24 Ark. 511; *Stagg v. Linnenfelter*, 59 Mo. 336.

²*Tenney v. Prince*, 4 Pick. 385; *Josselyn v. Ames*, 3 Mass. 274; *Campbell v. Butler*, 14 John. 349;

Nelson v. Dubois, 13 John. 175; *Reynolds v. Ward*, 5 Wend. 501; *Fulton v. Matthews*, 15 John. 433; *Turner v. Burrows*, 8 Wend. 144; *Russell v. Lanstoffs*, 2 Doug. 514; *Collis v. Emmett*, 1 H. Bl. 313; *Violet v. Patton*, 5 Cranch, 151.

³*Oakley v. Boorman*, 21 Wend. 588.

⁴*Moore v. Folsom*, 14 Minn. 340.

⁵*Bank of Toronto v. Hunter*, 20 How. Pr. 292.

⁶Vol. I, p. 220.

the amount, the sureties were liable only for the other half, although there was a mistake in making the note payable to the firm instead of the plaintiff alone, unless the sureties were privy to, and agreed to the making of the note, as the plaintiff alleged it ought to have been made.¹ So a note or bill may be indorsed by a surety to give it value for negotiation in the hands of the payee or any subsequent holder. While such paper, valid in its inception, is held by any person except the accommodated party, deriving title from the party for whose benefit it was made, it is enforceable against the accommodation maker, acceptor or indorser in the same manner and for the same amount as though he was not a surety. The drawer of an accepted bill, and the indorsers of notes and bills, are secondarily liable to the holder, and are in a certain sense sureties. When their liability becomes fixed, by demand and notice, the holder is *prima facie* entitled to recover from either the face amount of the paper; but between immediate parties, indorsee against his indorser, or payee against drawer, the consideration between them of the transfer may be inquired into, and if the plaintiff has discounted the paper at a larger discount than the interest, or has paid less than its face value, the amount paid and interest is the measure of damages, exclusive of costs of protest and damages on bills.² This is the measure of liability implied by law from the manner in which the drawer and indorsers become parties.

In cases of guaranty of payment, either express or implied, the rule is not the same. It is true that that consideration is open to examination, when a simple contract, and now generally, by statute, even when under seal; but not with a view to limiting the recovery to it, or to give weight to any complaint of inadequacy.³ The undertaking of the guarantor is commensurate with that of the principal debtor;⁴ and the general

¹ *McMicken v. Webb*, 6 How. U. S. 292.

² *Braman v. Hess*, 13 John. 52; *Wright v. Butler*, 6 Wend. 284; *Powell v. Waters*, 17 John. 176; *Baker v. Arnold*, 3 Cai. 279; *Munn v. Commission Co.* 15 John. 44; *Schaeffer v. Hodges*, 54 Ill. 337;

Wiffer v. Roberts, 1 Esp. 261; *Cram v. Hendrick*, 7 Wend. 569; *Short v. Coffeen*, 76 Ill. 245; *Cook v. Clark*, 4 E. D. Smith, 213; *French v. Grindle*, 15 Me. 163; *Lobdell v. Baker*, 3 Met. 469; *Cobb v. Titus*, 10 N. Y. 698.

³ *Oakley v. Boorman*, 21 Wend. 588.

⁴ *Gage v. Lewis*, 68 Ill. 604.

principle applies that the injured party is entitled to recover a sum as damages for the breach of a contract which is equivalent to the benefit he would have derived from its performance.

In New York, a few cases have been determined exceptionally, that is, on the principle that a guarantor, like an indorser, is only liable for the amount paid; but they are believed to be departures from the general rule applicable to guaranties. In one of these cases,¹ a note for \$210, payable to the defendant or bearer, was sold by him to the plaintiff for \$200, and he guarantied the payment of it. The plaintiff brought suit on this guaranty, but he sought to recover only the amount he had paid, and it was insisted for him that the rule between indorsee and indorser applied.² The defendant set up the defense of usury, because for \$200 he agreed to pay \$210, with interest on the latter sum from a previous day. Cowen, J., said: "It is answered that an usurious intent is not to be inferred, inasmuch as the plaintiff cannot in legal effect recover, and does not in truth seek to recover, more than he advanced, with the legal interest. If such were the express agreement at the time, it would clearly take away the sting of usury; and if that appear upon the face of the declaration to be but the legal effect of the guaranty, then the case is the same. Had the defendant simply indorsed the note, leaving himself to be charged in the usual way by demand and notice, the transaction would not have been usurious." It was considered as depending on the same principle as *Cram v. Hendricks*.³ In another case,⁴ a bond and mortgage for \$3,000, payable one year from date, with interest to become due half-yearly, and on which over five months' interest had already accrued, were assigned absolutely by the holder for \$2,600, in order to raise money. The assignment stated the consideration paid by the assignee to be \$3,000, and contained a covenant that that amount was due and owing on the bond and mortgage. At the time of executing the assignment, the assignor also executed to the assignee a bond, with surety, conditioned that the mortgagor should pay \$3,000, together with the interest, by the day appointed for that purpose, in the securities

¹ *Mazuzan v. Mead*, 21 Wend. 285.

² *Braman v. Hess*, 13 John. 52.

³ 7 Wend. 569.

⁴ *Rapelye v. Anderson*, 4 Hill, 472.

assigned. On a bill filed by the assignor to set aside the assignment, and to have the bond of guaranty canceled, it was held that the transaction was on its face a mere sale of a chose in action, unconnected with a loan, and therefore not *per se* usurious. It was declared also, that, in an action upon a bond of guaranty, the assignee's recovery would be limited to the actual amount paid for the bond and mortgage. Cowen, J., dissented, and in his opinion opposes the principle of the preceding case. He says: "The supreme court ruled the same way as this court did, on what were believed to be equivalent circumstances, but on the express authority of a court having power to review the decision." That a guaranty of payment and an indorsement are equivalent circumstances is expressly affirmed by the senators who delivered the prevailing opinions; that is, equivalent in the aspect in which they were considered — in an action by the guarantee or indorsee, that the amount recoverable is the amount paid to the guarantor or indorser.¹

¹ Franklin, Senator, said: "But it is contended that this ought to be considered as a loan in consequence of a collateral bond having been given and received to secure the ultimate payment of the sum of \$3,000 and interest, for which the original bond and mortgage were given, and for which only \$2,600 had been paid by the appellant. But I am unable to distinguish this case from that of *Cram v. Hendricks*, or from the still stronger one of *Mazuzan v. Mead* (21 Wend. 285), in which a note of \$210 was sold for \$200, being a greater discount than legal interest, and the seller guaranteed, in express terms, to pay not only the \$200, but the amount payable by the face of the note. . . . If the condition of the bond of guaranty of *Anderson and Ramsen* had been, that in case *John Anderson*, the original obligor, did not pay the sum of \$3,000 and interest secured by his bond and mortgage, that then and in that case they would, it would

have presented no stronger case than the indorsement of *Cram* on the note of *Hendricks*, or the guaranty mentioned in the case of *Mazuzan v. Mead*. The condition of this bond, however, is, not that *Anderson and Ramsen* would pay the sum of \$3,000 and interest, if the obligor *John Anderson* did not, but that if he did pay that amount, then the bond was to be void, otherwise to remain in full force and virtue; so that upon the principles laid down and decided in the case of *Cram v. Hendricks* and *Mazuzan v. Mead*, the amount which could be collected by *Rapelye* would have been, not the consideration expressed in the assignment, or the amount for which the bond and mortgage of *John Anderson* were given, but the actual sum received, being \$2,600, together with the interest which might have accrued thereon from the time of the actual receipt thereof."

Bockee, Senator, said: "The guar-

While it is true that an indorsement in blank is by legal construction a guaranty only of the payment of the note to the amount paid on the transfer, with interest, it must be equally true that where the agreement is not left to be implied from a simple indorsement, but is expressed, the latter will have effect according to the intent which is thus manifested; and if the undertaking is that the principal debtor shall pay the amount of the note, or if the guarantor undertakes directly to pay the sum mentioned in the note, on the default of the maker or other condition fulfilled; in either case, that sum will, on general principles, be the measure of damages in the action upon the guaranty.¹

In another case in New York, decided the same year as the first of the preceding cases,² the court expressly ruled that the obligation of a guarantor is not to be measured by the consideration paid, when the intent is clear to secure the full amount of the paper guaranteed. Cowen, J., said: "It is not for us to hamper Mr. O, or any other citizen, in such a way as to preclude his making money by insuring the debts of his neighbors. It is enough that he has not been imposed upon. He is *sui juris*. He fixed the consideration of his indorsement; and had it been to secure a much larger amount, the result must have been the same. There is no distinction in principle

anty above mentioned is that the mortgagor, John Anderson, shall pay the \$3,000. It is not in the alternative that the obligors shall pay that sum. If John Anderson does not pay, the obligors are left merely on the ground of their legal liability. The judgment is entered for the sum of \$3,000, and the court may direct by indorsement on the execution a collection of the sum equitably due, or, on an assessment of damages by a jury, they may award the sum actually paid on the assignment and sale of the mortgage. It may be admitted that *prima facie* the rule of damages would be the sum of \$3,000, the consideration mentioned in the assignment. So it

was in the case of Cram v. Hendricks. Cram stood on the ground of legal liability as general indorser of a promissory note, and the rule of damages against him was, *prima facie*, the amount of the note. The court, by limiting the amount of recovery to the actual consideration of the indorsement, refused to give a construction which would render the contract usurious." Goldsmith v. Brown, 35 Barb. 484, and Jones v. Stienbergh, 1 Barb. Ch. 250.

¹ See Anderson v. Rapelye, 9 Paige, 483, 486, 491; Yankee v. Lockhart, 4 J. J. Marsh. 277.

² Oakley v. Boorman, 21 Wend. 588.

between an indorsement to secure future advances, and an indorsement to secure a precedent debt."

A guaranty of collection is in legal effect an undertaking to pay the debt, if it cannot be made, by diligent legal measures, from the principal debtor; or any deficiency after that remedy is exhausted. It is only in that event, and only to that extent, that such a guarantor can be put in default; payment, according to that measure, will satisfy his undertaking. There is some diversity as to the necessity of a judgment, and return of execution unsatisfied against the principal debtor, as an absolute condition to suit on such a guaranty.¹ But it is agreed that the guarantor is only answerable if, and to the extent, the debt is uncollectible against the principal debtor. When a note is guaranteed to be collectible, the legal remedy against all prior solvent parties, such as an indorser,² the estate of a deceased indorser,³ and all of several principals,⁴ must be exhausted, before the guarantor is in default.⁵ Such a guaranty not only binds the guarantor to pay the uncollectible debt, but also the costs of the action against the principal and other parties for its collection.⁶ Where an action against the principal is required as a condition, this rule as to costs is manifestly just. In such a case the guarantee will not have the full benefit of the agreement, unless the guarantor bears the expense of complying with the condition which he has imposed.⁷

Where other evidence will suffice to show the debt not collectible, so as to allow the guarantee to resort to the guarantor without first bringing a suit, the latter's liability for costs in a

¹ *Cumpston v. McNair*, 1 Wend. 457; *White v. Case*, 13 Wend. 543; *Craig v. Parkis*, 40 N. Y. 181; *Cady v. Sheldon*, 38 Barb. 103; *Day v. Elmore*, 4 Wis. 190; *Dyer v. Gibson*, 16 Wis. 557; *French v. Marsh*, 29 Wis. 649; *Peck v. Frink*, 10 Iowa, 193; *Stone v. Rockefeller*, 29 Ohio St. 625; *Brackett v. Rich*, 23 Minn. 485; *Dana v. Conant*, 30 Vt. 246; *Thomas v. Dodge*, 8 Mich. 51; *Cooke v. Nathan*, 16 Barb. 342; *Sanford v. Allen*, 1 Cush. 473; *Camden v. Doramus*, 3 How. U. S. 515.

² *Loveland v. Shepard*, 2 Hill, 139; *Dana v. Conant*, 30 Vt. 246.

³ *Benton v. Fletcher*, 31 Vt. 418.

⁴ *Aldrich v. Chubb*, 35 Mich. 350.

⁵ *Brandt on Suretys. & Guar.* § 84.

⁶ *Mosher v. Hotchkiss*, 3 Abb. App. Dec. 326; *S. C.* 3 Keyes, 161; *Tuton v. Thayer*, 47 How. Pr. 180.

⁷ *Mosher v. Hotchkiss*, 3 Keyes, 161. See *Redfield v. Haight*, 27 Conn. 31; *Gilman v. Lewis*, 15 Me. 452.

suit which is nevertheless brought, must depend on there being reasonable grounds to expect that the debt could be collected in whole or in part by the proceedings in which the costs were incurred. Where, on a guaranty of a mortgage, the guarantee incurred costs to foreclose it after a prior mortgage of the same premises had been foreclosed, a sale made, and a deed delivered, it was held he could not recover the costs of such an unnecessary foreclosure.¹

If the debt, the collection of which is guarantied, is in some manner collaterally secured, there is some conflict of decision on the question whether the guarantor is liable for that part of the debt which might be made by resort to the security. In a case in Ohio,² where the collection of a note was guarantied, and, pursuant to an understanding when the guaranty was made, the creditor took security from the maker by mortgage of real estate, it was held that on default and bankruptcy of the maker, the guarantee could at once pursue his remedy on the guaranty against the guarantor, without exhausting his remedy on the security. Gilmore, J., said: "In considering this question it is to be kept in mind that the plaintiff sues upon a contract of guaranty, relating alone to the collectibility of the note upon the back of which it is indorsed. The terms of such a contract are to be construed strictly, and the words being those of the guarantor, are to be taken most strongly against him. The law will not supply any condition which is not incorporated into the agreement, or to be fairly implied from the language used; and, in the absence of accident or mistake, it is presumed conclusively that the terms of the contract, as agreed upon between the parties at the time, are fully expressed in the written guaranty. It cannot be said that the contract sued upon, and that set up by way of defense, have any such necessary connection with each other as to require them to be read and construed together as constituting one contract. They are neither of the same nature nor between the same parties. They are therefore wholly independent of each other, and must be so regarded. As independent contracts, each must be susceptible

¹ Peck v. Cohen, 40 N. Y. Super. Ct. 142. See Brown v. Haven, 37 Vt. 439. ² Stone v. Rockefeller, 29 Ohio St. 625.

of performance according to its terms and legal effect. These contracts are respectively susceptible of such performance, and the guarantor is bound to perform according to the terms of guaranty sued upon; i. e., to pay the note at maturity if the maker fails to do so, and is then entirely insolvent and bankrupt. When he pays the note in accordance with the terms of his guaranty, the contract set up in his answer will, in equity, at once enure to his benefit by substitution." This reasoning is not very satisfactory. By the mortgage the creditor acquires a specific lien on the debtor's property for the debt; the insolvency and bankruptcy of the debtor has not affected that lien; hence, to the extent of that property so appropriated to satisfy the debt, the insolvency or bankruptcy of the debtor is wholly immaterial. He has so much property, notwithstanding his insolvency or bankruptcy, subject to the appropriate process of a court for the satisfaction of the debt. The note and mortgage are connected, and, without exhausting the security afforded by the latter, the note in no proper sense could be treated as not collectible; to the extent that the debt could be made from such security, it should be deemed collectible. In a Michigan case,¹ the payee of a note, secured by mortgage of real estate, transferred the note and assigned the mortgage. He indorsed on the note a guaranty of collection; and it was held that he was not liable on the guaranty until resort had been had to the mortgage. In such a case it was considered that the guaranty does not refer merely to the personal responsibility of the guarantor. When, with the guaranty itself, the guarantor furnishes the means of obtaining payment, in whole or in part, and these means have been attached to the debt itself, and cannot be severed from it, the parties must be held to have contemplated the entire transaction and a resort to those means. Any other rule would be at variance with the object of such securities. Although a mortgage is in a strict sense only collateral to the debt, yet it is generally regarded as forming its chief value, and persons usually contract with that idea.²

¹Barman v. Carhartt, 10 Mich. 338; affirmed in Johnson v. Shepard, 35 Mich. 115.

²Baxter v. Smack, 17 How. Pr.

183; Cady v. Sheldon, 33 Barb. 103; Vanderkemp v. Shelton, 11 Paige, 28; 1 Clarke, 321; Brainard v. Reynolds, 36 Vt. 614.

DISCHARGE OR REDUCTION OF A SURETY'S RESPONSIBILITY BY THE ACT OF THE CREDITOR.—A surety is a favorite of the law;¹ and where any act is done by the obligee that may injure him, the courts are very glad to lay hold of it in his favor.² If the creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, he will be discharged.³ Courts of law and equity are governed by the same principles in determining whether a surety has been discharged by anything done by the creditor.⁴ Whatever will exonerate a surety from liability in equity will constitute a sufficient defense at law.⁵

As a security for, and means of reimbursement, a surety has a right of subrogation, upon the performance of his contract; he is then entitled to stand in the place of the creditor as to all securities for the debt held or acquired by the creditor, and to have the same benefit from them as the creditor might have had.⁶ This right extends to all securities held by the creditor for the payment of such debt at the time the same is paid, even though such securities were acquired without the knowledge of the surety, and after he became bound.⁷ This right does not depend upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded, not upon any contract, express or implied, but springs from the most obvious principles of natural justice.⁸

¹ *People v. Chalmers*, 60 N. Y. 154.

² *Law v. East India Co.* 4 Ves. 824.

³ 1 Story's Eq. § 325.

⁴ *Schroeppel v. Shaw*, 3 N. Y. 446.

⁵ *Id.*; *Baker v. Briggs*, 8 Pick. 128; *Springer v. Toothaker*, 43 Me. 381; *People v. Jansen*, 7 John. 332; *King v. Baldwin*, 2 John. Ch. 554; *Sailly v. Ellmore*, 2 Paige, 497; *Ville v. Hoag*, 24 Vt. 46; *Heath v. Derry Bank*, 44 N. H. 174; *Watriss v. Pierce*, 32 N. H. 560; *Rogers v. School Trustees*, 46 Ill. 428; *Shelton v. Hurd*, 7 R. I. 403; *Wayne v. Kirby*, 2 Bailey L. 551; *Maxwell v.*

Connor, 1 Hill Eq. 14; *State Bank v. Watkins*, 6 Ark. 123; *Smith v. Clifton*, 48 Miss. 66.

⁶ *Cullum v. Emanuel*, 1 Ala. 23; *Heart v. Bryan*, 2 Dev. Eq. 147; *Marsh v. Pike*, 10 Paige, 595; *Eaton v. Hasty*, 6 Neb. 419; *Buchanan v. Clark*, 10 Gratt. 164; *Mathew v. Aikin*, 1 N. Y. 595; *McArthur v. Martin*, 23 Minn. 74; *In re Hewett*, 25 N. J. Eq. 210; *Lewis v. Palmer*, 28 N. Y. 271.

⁷ *Scanland v. Settle*, Meigs, 169; *Smith v. McLeod*, 3 Ired. Eq. 390.

⁸ *Mathews v. Aikin*, 1 N. Y. 595.

When one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor, both may have been equally liable; but if, as between themselves, there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain reimbursement.¹ He is entitled to recourse to all persons who stand in the relation of principal to him for reimbursement, and to all co-sureties for contribution.

If the creditor parts with, or renders unavailable, securities, or any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated to the extent of the value of such securities; because securities which the creditor is entitled to apply in discharge of his debt he is bound to apply, or to hold them as a trustee, ready to be applied for the benefit of the surety.² The surety, in such cases, is discharged to the extent that he is injured.³ A waste or misapplication of a pledge or other security, or its avails,⁴ or a fraudulent sale of property held as security, at less than the value,⁵ will entitle the surety to relief to the extent of his injury from such waste, sale, or the sacrifice on such sale.

A surety is also discharged by the tender of payment to the creditor, refused by him.⁶ So, if the creditor purchase property on which the debt for which the surety is bound is a lien, and remove it from the state;⁷ if the creditor has the means of satis-

¹ McCormick v. Irwin, 35 Pa. St. 111; N. Y. State Bank v. Fletcher, 5 Wend. 85; Huston v. Branch Bank, 25 Ala. 250; Boyd v. McDonough, 39 How. Pr. 389.

² Theobald on Pr. & Su. § 174; Cullum v. Emanuel, 1 Ala. 23.

³ Cummings v. Little, 45 Me. 183; N. H. Savings Bank v. Calcord, 15 N. H. 119; Ives v. Bank of Lansingburgh, 12 Mich. 361; Wharton v. Duncan, 83 Pa. St. 40; Kirkpatrick v. Hawk, 80 Ill. 122; Foss v. Chicago, 34 Ill. 488; Rogers v. School Trustees, 46 Ill. 428; Pitts v. Congdon, 2 N. Y. 352; Bonney v. Bonney, 29 Iowa, 448; American Bank v. Baker, 4

Met. 164; Holland v. Johnson, 51 Ind. 346; Baker v. Briggs, 8 Pick. 122; Chester v. Bank of Kingston, 16 N. Y. 336; Finney v. Commonwealth, 1 Penn. 240; Hurd v. Spencer, 40 Vt. 581; Shannon v. McMullen, 25 Gratt. 211; Law v. East India Company, 4 Ves. 824; Port v. Robbins, 35 Iowa, 208; Taylor v. Jeter, 23 Mo. 244; Schoeppel v. Shaw, 5 Barb. 580; Brandt on Sureties. & G. § 370.

⁴ Phares v. Barbour, 49 Ill. 370; Vose v. Florida R. R. Co. 50 N. Y. 369.

⁵ Everly v. Rice, 20 Pa. St. 297.

⁶ Joslyn v. Eastman, 46 Vt. 258; vol. I, p. 471.

⁷ McMullen v. Hinkle, 39 Miss. 142.

faction in his hands, and suffers such means to pass into the hands of the debtor;¹ or if a creditor of an estate, with surety, refuse to present his claims to the commissioners for adjustment, when requested to do so, the surety will be discharged.² But where the surety applies to a court of chancery before suit is brought against him, as he may do, to be relieved from his obligation on a debt for which a decedent estate is primarily liable, and it appears that such estate would not have paid the whole debt, the court will require the surety to pay into court, for the benefit of the creditor, the deficiency, out of which the surety will be allowed to deduct his costs, and the balance, if any, will be paid to the creditor.³

Where the creditor has obtained a lien upon property by judicial process, or by judgment, and releases it, the surety for the debt will be discharged to the extent of the value of the property so released.⁴

The surety is not, however, discharged by release of securities or liens unless he is injured;⁵ or no farther than his means of indemnity are impaired.⁶ Thus a release of a part of the property included in a mortgage securing a debt, without more, will not discharge a surety; for, if there should still be enough left for his protection, he is entitled to have it subjected to the payment of the debt; and, if sufficient to pay it, he is not, of course, prejudiced by the partial release, and cannot complain.⁷ So the surrender of a fictitious or forged bond held as security will not affect the liability of a surety.⁸ In *Cummings v. Little*,⁹ the defendants were joint and several promisors upon three promissory notes payable to one Smith or order. Smith also held a mortgage from one of the defendants of personal property of less value than the amount of the notes. Afterwards, without consulting the other defendants, who were, in

¹ *Commonwealth v. Vanderslice*, 8 S. & R. 452.

² *McCollum v. Hinkley*, 9 Vt. 143.

³ *Id.*

⁴ *Moss v. Pettengill*, 3 Minn. 217; *Parker v. Nations*, 33 Tex. 210; *Jenkins v. McNeese*, 34 Tex. 189; *Mulford v. Estudillo*, 23 Cal. 94; *Bank v. Fordyce*, 9 Pa. St. 275. See *Lusk v. Ramsay*, 3 Munf. 417.

⁵ *Brandt on Sureties*, & G. § 380; *Blydenburgh v. Bingham*, 38 N. Y. 371; *American Bank v. Baker*, 4 Met. 164.

⁶ *Barhydt v. Ellis*, 45 N. Y. 107.

⁷ *Bonney v. Bonney*, 29 Iowa, 448.

⁸ *Loomis v. Fay*, 24 Vt. 240.

⁹ 45 Me. 183.

fact, sureties on the notes, though not signing as such, he discharged the mortgage. The notes were transferred to the plaintiff by the payee after maturity. Davis, J., delivering the opinion of the court, said: "It has been treated as a doubtful question, whether the value of the property stated in the mortgage is not conclusive upon the parties. Admitting that it is conclusive, it is so only in regard to the value at the date of the mortgage. Any subsequent loss or depreciation may properly be taken into consideration in estimating the value of the property at the time when the mortgage was discharged. And it is obvious that the discharge of the mortgage could have injured the sureties only to the amount of the value of the property, so estimated. And, though the sureties are discharged to that extent, for the excess of the amount due at the date of the discharge, over and above the value of the property then released, the sureties are still liable.¹ But it does not follow that they are liable in this action. If an action at law can be maintained upon the note, it cannot be against the principal and sureties *jointly*. For, in such an action, the defendants cannot be separated in the judgment. They must stand or fall together. But they are not liable for the same amount. How, then, can judgment be entered up? There is no provision of law by which the principal may be held for the whole, and the sureties for a part only, and several executions issued accordingly. Nor has this court general equity powers, as in some of the states, by which, after judgment against all the parties, the plaintiff may be enjoined from enforcing it against the sureties for the whole amount. Therefore, in an action at law, unless they may prove the release of the collateral security as an entire defense to the action, they have no remedy.² In this action, if liable at all, they are liable for the whole amount of the note. Not being liable for the whole, they cannot be held in this suit for any part. If the plaintiff had released the principal, he would have discharged the sureties. But a release of collateral securities, of less value than the amount of the note, discharged the sureties *pro tanto* only. As to the plaintiff's rem-

¹ American Bank v. Baker, 4 Met. 9 Watts & S. 36; 20 Pa. St. 297; 6 164; Bank v. Calcord, 15 N. H. 119; Sm. & M. 24.

edy for the balance, it is unnecessary for us to express any opinion.”¹

Where the creditor has taken a security from his debtor, after a surety had become bound for the debt, under an arrangement with the debtor, which binds the creditor in good faith to discharge the security upon an agreed event other than the actual payment of the debt, the discharge of the security pursuant to such an arrangement will not necessarily discharge the surety. This was held in a case² involving these facts: A creditor, after the failure of the surety, who was an accommodation indorser of a negotiable note, not then due, applied to the maker of the note for further security, who thereupon made a mortgage of real estate sufficient to secure the debt, upon the parol condition that the creditor should release the mortgaged premises upon the debtor's providing other satisfactory security, soon after which the debtor became bankrupt, and some months after, and before the note became due, the creditor accepted as security the indorsement of the note, by a responsible person, under the name of the original surety, and thereupon, without notice to the original surety, released the mortgaged premises. The fact that the mortgage had been taken and was held by the creditor, came to the knowledge of the surety; but the parol agreement to discharge it was wholly unknown to him. It was held in a suit by the creditor against the original surety on the note so indorsed, that the above facts constituted no valid defense.³

The direct discharge of a lien or security for the debt, whether it be one created by contract, or obtained by attachment or execution levy, or by judgment, will relieve a surety to the extent that he suffers loss thereby; yet, where the loss of a security does not arise from a positive or affirmative act of the creditor, but results from his neglect to take some measures to protect or continue it, and render it effectual and productive, the surety has not always the same ground of complaint. As to securities in the hands of the creditor when the surety assumes his obligation, and the existence of which for what they purport to be, must be presumed to be contemplated by the

¹ See *Carroll v. Bowie*, 7 Gill, 34.

³ See *Sheehan v. Taft*, 110 Mass.

² *The Pearl St. Cong. Society v.* 331.

Imlay, 23 Conn. 10.

surety, conscience and good faith may impose some obligation upon the creditor, assuring the surety against any undisclosed infirmity known to such creditor or traceable to his act;¹ and against any disappointment by the failure to do any act necessary to make such security effective. Thus, the failure of the creditor to have recorded the bill of sale of a vessel given him as security by the principal, in consequence of which she was taken possession of by a subsequent purchaser, was held to have discharged the surety to the full extent of her value.² But he is under no obligation to take active measures to obtain payment from the principal, unless required to do so by the surety's contract; nor to obtain security; and it has been held that he is not bound to active diligence to preserve liens which he has acquired subsequent to the surety becoming bound; that he may omit to bring suit, or otherwise to prefer the claim, against the principal or his estate;³ that he may omit to take out execution, or countermand one already issued, before levy; may omit to revive a judgment to continue it as a lien, or to enroll it when essential to create a lien.⁴

As the creditor is a trustee in respect to any securities he may obtain for the debt for which a surety is bound, he would seem to owe, as a duty to the surety, ordinary diligence at least

¹ Hayes v. Ward, 4 John. Ch. 123; Russell v. Annable, 109 Mass. 72.

² Capel v. Butler, 2 Sim. & Stewardart, 457.

³ Johnson v. Planters' Bank, 4 Sm. & M. 165; Cohen v. Commissioners, 7 Sm. & M. 437; Cain v. Bates, 35 Mo. 427; Hathaway v. Davis, 33 Cal. 161; People v. White, 11 Ill. 341; Hooks v. Bank of Mobile, 8 Ala. 580; Minter v. Branch Bank, 23 Ala. 762; Fetrow v. Willman, 40 Ind. 148; Sibley v. McAllister, 8 N. H. 389; McBroom v. The Governor, 6 Port. 32; Pearson v. Gayle, 11 Ala. 278; Ray v. Brenner, 12 Kan. 105; Villars v. Palmer, 67 Ill. 204; Mitchell v. Williamson, 6 Md. 210; Vredenberg v. Snyder, 6 Iowa, 39; Moore v. Gray, 26 Ohio St. 525; Ashby v. Johnston, 23 Ark. 163; Dye v. Dye,

21 Ohio St. 86; Richards v. Commonwealth, 40 Pa. St. 146. But see McCollum v. Hinkley, 9 Vt. 143; Dorsey v. Wayman, 6 Gill, 59.

⁴ United States v. Simpson, 3 Penn. 437; Mandorff v. Singer, 5 Watts. 172; The Farmers' Bank v. Reynolds, 13 Ohio, 84; Pickers v. Finney, 12 Sm. & M. 468; McGee v. Metcalf, 12 Sm. & M. 535; Bellows v. Lovell, 4 Pick. 153; 5 id. 307; Chipman v. Todd, 60 Me. 232; Schroepell v. Shaw, 3 N. Y. 446. See 2 Am. Lead. Ca. note to Pain v. Packard, 242; King v. Baldwin, 244; 3 Lead. Cas. in Eq. note to Rees v. Berrington, 1870; Terrel v. Townsend, 6 Tex. 149. See Coombs v. Parker, 17 Ohio, 239; Wornell v. Williams, 19 Tex. 180; Herrick v. Orange Co. Bank, 27 Vt. 584.

to preserve it. And when it is lost in consequence of a want of that diligence, the surety is relieved to the same extent as when the creditor, by a positive act, relinquishes it or otherwise renders it unavailing. The creditor is under no obligation to exert himself to obtain a lien; but if he chooses to do so, he is bound to ordinary care and diligence in preserving it for the interest of all parties concerned.¹ In *Taft v. Gifford*,² D as principal, and G as surety, gave a joint note to T, in March, 1841, payable in April, 1842. In April, 1843, T demised a farm to D for one year, by a written lease, which contained a provision that the produce and profits of the farm should be holden for the payment (among other debts of D) of the aforesaid note. T took no measures to obtain the produce of the farm, but permitted D to dispose of it, without objection; and G had no knowledge of these provisions in the lease until after D had disposed of such produce. Held, in a suit by T on the note, that his omission to obtain the produce of the farm and apply it to the payment or part payment of the note, did not discharge G from his liability to pay the note in full. The principal was defaulted and the surety defended. His defense was put on the ground that the plaintiff voluntarily relinquished a security which was given him by the principal, and from which the whole or a part of the amount of this note might have been realized; that, by a rule of equity, adopted as a rule of law, the defendant is discharged, in full or *pro tanto*. Shaw, C. J., said: "The court are of opinion that the facts do not bring the case within the principle stated, even supposing — of which we give no opinion — that this would be a good defense in a joint action, upon a joint note, against principal and surety. The plaintiff re-

¹ *City Bank v. Young*, 43 N. Y. 457; *Sherraden v. Parker*, 24 Iowa, 28; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Lochrane v. Solomon*, 38 Ga. 286; *Merchants' Bank v. Cordevoille*, 4 Rob. (La.) 506; *Saulet v. Trepacquier*, 2 La. Ann. 427; *Ramsey v. Westmoreland Bank*, 2 Penn. 203; *Watts v. Shuttleworth*, 5 H. & N. 235; *Gillespie v. Darwin*, 6 Heisk. 21; *Hayes v. Little*, 52 Ga. 555; *Cloptin v. Spratt*, 52 Miss. 251; *Slatterly v.*

Police Jury, 2 La. Ann. 444; *Watson v. Alcock*, 1 Smale & Giff. 319; affirmed, 4 DeGex, Mac. & G. 242; *Ex parte Mure*, 2 Cox, 63; *Miller v. Berkey*, 27 Pa. St. 317; *Toomer v. Dickerson*, 37 Ga. 428; *Burr v. Boyer*, 2 Neb. 265; *Teaff v. Ross*, 1 Ohio St. 469; *Mayhew v. Cricket*, 2 Swanst. 185. See *Black River Bank v. Page*, 44 N. Y. 453.

² 13 Met. 187.

ceived nothing under this provision. It was a mere executory agreement, authorizing the plaintiff to take possession of the produce when it should come into existence; and if he had exercised that power and taken such possession, before the right of any creditor or purchaser had intervened, it might have given him a lien.¹ But until possession taken, he had no lien, and could not hold the produce against a *bona fide* purchaser or attaching creditor.² And we think he was not bound to any active diligence in availing himself of the power to obtain a lien, any more than the holder of a note, with a surety, is bound to active diligence in securing his note by attachment of the property of the principal, when he has an opportunity to do so.³ It was a collateral security, not given at the time the note was made, but afterwards, and not taken with the knowledge, or for the use and benefit of the surety. It was a means of obtaining a pledge, at the option of the plaintiff, of which he might have availed himself or not, but it did not constitute an actual security. The plaintiff's forbearing to act upon this executory agreement, and taking no measures to enforce it, was not such a voluntary relinquishment of any pledge or security as to bring the case within the principle relied on by the defendant."

Where the creditor has released a security to the benefit of which the surety would be entitled on the performance of his contract, whether the surety is injured, or on which party is the burden of proof in respect to the amount of damages, must depend largely on the particular facts of the case. Where a judgment against the principal was discharged, and there was no proof as to the value, it was presumed to be of its face value.⁴ This conclusion would seem to be correct on the general presumption of solvency, and without invoking the principle stated, which is undoubtedly correct, "that when the amount is made incapable of estimation by the act of the wrongdoer, he must be made responsible for the value it may, by reasonable possibility, turn out to be of."

A creditor who held sundry demands as a collateral security

¹ Bartlett v. Williams, 1 Pick. 288.

² Jones v. Richardson, 10 Met. 481.

³ 1 Story's Eq. § 825.

⁴ Fielding v. Waterhouse, 8 Jones & Spen. 424; Brandt on Suretys. & G. § 370.

for a debt for which a surety was also bound, compromised with the debtors in such collateral demands and sued the surety for deficiency. The plaintiff insisted that these compromises were *prima facie* beneficial, rather than prejudicial to the defendants, and if not so, it was incumbent on the defendants to prove it, it being reported by the master that the compromises were made in good faith. The court said, however, that it was not sufficient for the plaintiff to prove that they acted in good faith. They might thus act, on the opinion that they were authorized to make the compromises, without consulting the sureties; or they might think the compromises would be beneficial to the sureties. But if they have in fact been prejudicial and not beneficial, the plaintiffs are clearly responsible, and must account for the securities at their nominal or real value. And they are bound to prove all the facts and circumstances, in reference to which the compromises were made. If these facts and circumstances should be proved, and it should thereupon appear that the defendants have not been, and cannot be prejudiced by the compromises, then another question would be raised, namely, whether the plaintiffs would be bound to account for the securities at their nominal or real value.¹ There is doubtless a presumption that the surety is injured by the release of any security, but this presumption would not of itself entitle him to any substantial deduction from the debt; but securities usually import a certain value or amount secured, and the value or amount thus indicated may usually be taken as a measure of the actual value in the absence of countervailing evidence.²

EFFECT OF RELEASING ONE OR MORE OF SEVERAL PARTIES.—The creditor will discharge sureties, or reduce his recovery against them, by releasing any party to whom they might have recourse for reimbursement or contribution after payment of the debt. Where the obligation is joint, a release of one, whether principal or surety, will, at law, discharge all; but the rule is otherwise in equity.³ The discharge of the principal will always discharge the sureties; for he is bound to reimburse them; and

¹ American Bank v. Baker, 4 Met. 164.

² See Cummings v. Little, 45 Me.

183; Vose v. Florida R. R. Co. 50 N. Y. 369.

³ Rice v. Morton, 19 Mo. 263; State v. Matson, 44 Mo. 305.

if the creditor releases him, or he makes a successful defense to the action on the merits, he is no longer under that obligation.¹ Where a suit was brought against a sheriff and his two sureties on his official bond, and on the first trial judgment was recovered against all; the sheriff appealed, and the sureties did not, and on the final trial the sheriff was acquitted, it was held that the first judgment could not be enforced against the sureties.² If, however, when the principal is released, the right of action against the sureties is reserved, they are not discharged.³ So if, in the discharge of one of several sureties, the right of action against the others is reserved, their rights are not affected by such discharge; for the discharged surety will still be liable for contribution.⁴ But without such reservation, the discharge of one would be an injury to the others to the extent of such right to contribution. The release of one surety cannot be permitted

¹ *Trotter v. Strong*, 63 Ill. 272; *State v. Matson*, 44 Mo. 305; *Brown v. Ayer*, 24 Ga. 288; *Rogers v. School Trustees*, 46 Ill. 428; *Tyner v. Hamilton*, 51 Ind. 259; *Stockton v. Stockton*, 40 Ind. 225; *Vose v. Florida R. Co.* 50 N. Y. 369.

² *Beale v. Cochran*, 18 Ga. 38; *McClosky v. Wingfield*, 29 La. Ann. 141. In *Bank of the State v. Robinson*, 13 Ark. 214, it was held that if separate suits be brought for the same cause of action against co-obligors, where one is principal and the other is surety, and the principal is discharged on the trial on a plea to the merits which would inure to the benefit of both if sued jointly, as a plea of payment or accord and satisfaction; such judgment in favor of the principal is not an estoppel against the plaintiff if pleaded by the surety in bar of the action against him. There is no privity between principal and surety, and the parties are not the same in the two suits; the questions in one are not precluded by the decision in the other. While it is true that sat-

isfaction from either will conclude the creditor, and prevent his obtaining it again; yet, he is not concluded by the decision in one case so that he may not, in the other, insist that he has not received satisfaction. See *McKeller v. Bowell*, 4 Hawks, 34; *Douglass v. Howland*, 24 Wend. 58; *Jackson v. Griswold*, 4 Hill, 528; *Hudson v. Robinson*, 4 M. & S. 475.

³ *Smith v. Winter*, 4 M. & W. 454; *Boulton v. Stubbs*, 18 Ves. 20; *Kearsley v. Cole*, 16 M. & W. 128; *Owen v. Homan*, 3 Eng. L. & Eq. 125; *Ex parte Gifford*, 6 Ves. 805; *Reporter's Note to Dunn v. Slee*, 1 Holt's N. P. 399; *Kirby v. Turner*, 6 John. Ch. 242; *S. C. Hopk. Ch.* 309; *Union Bank v. Beeck*, 3 Hurl. & Colt. 672; *Bateson v. Gosling*, L. R. 7 C. P. 9; *Hall v. Thompson*, 9 Upp. Can. C. P. 257; *Green v. Wynn*, L. R. 4 Ch. App. 204; *S. C. L. R.* 7 Eq. Ca. 28; *Hubbell v. Carpenter*, 5 N. Y. 171. See *Austin v. Derwin*, 21 Vt. 38.

⁴ *Clapp v. Rice*, 15 Gray, 557; *Thompson v. Lack*, 34 Eng. C. L. 540.

to increase the obligation of the others; therefore, so much of the debt as the released party would otherwise have been bound to pay, by way of contribution, is discharged by his release.¹

SURETY'S RIGHT TO DEFEND BETWEEN THE PRINCIPAL PARTIES.—A surety has the right for protection of his own interest to defend a suit brought against his principal, though not himself a party.² When sued with the principal he has of course the same right, and may set up any defense which pertains to the debt or demand. The payee of a note brought suit thereon for the use of a third person who had become the owner, against one of the promisors, a surety; the consideration of the note was the sale of a tract of land by the payee to the principal. At the time of the sale, there was an unsatisfied judgment against the vendor operating as a lien upon the land, and this judgment the beneficial plaintiff authorized the principal to discharge, promising to allow it as a credit against the note, and it was accordingly discharged; it was held that the promise to the principal inured to the surety; that it was a direct and original undertaking to allow the payment, not within the statute of frauds; and the instant it was made the note was extinguished *pro tanto*.³ So where money was paid by a tenant for repairs which the landlord agreed to pay by deduction from the rent, it was held to be in effect a payment on account of rent, and as such should be allowed in favor of the surety.⁴ He has a right to set up the defense that the signature of the principal was obtained by duress, or that for other reasons the contract was void in its inception.⁵ He has a right to set up any defense "inherent to the debt," but not those which are personal to the debtor.⁶ He cannot, however, control the principal in respect to a defense which may be waived by his act. Thus, a surety to a bond for the purchase money of a tract of

¹Jemison v. Governor, 47 Ala. 390; State v. Matson, 44 Mo. 305; Dodd v. Winn, 27 Mo. 501; Rice v. Morton, 19 Mo. 263; Sterling v. Forrester, 2 Bligh, 575; Hodgson v. Hodgson, 2 Keen, 704; Morgan v. Smith, 70 N. Y. 537.

²Jewett v. Crane, 35 Barb. 208.

³Cole v. Justice, 8 Ala. 793.

⁴Rosenbaum v. Gunter, 3 E. D. Smith, 203.

⁵Osborn v. Robbins, 36 N. Y. 365; McClintick v. Cummins, 3 McLean, 158; Strong v. Grannis, 26 Barb. 122; Denison v. Gibson, 24 Mich. 187; Morse v. Hovey, 9 Paige, 196.

⁶Baldwin v. Gordon, 12 Martin (La.), O. S. 373.

land cannot set up eviction by title paramount from the greater part of the tract, for the purpose of avoiding the contract, when the principal himself has acquiesced in a *pro rata* abatement of the price.¹

The surety will not be precluded from making a defense merely because the principal will not join in it.² When the defense of usury is not available to the principal, it cannot be made by the surety; as where the principal is prohibited by statute from setting up that defense.³ A bill was made by the principal in Ohio, and then taken to Virginia and there signed by the surety; it was usurious by the laws of Virginia but valid in Ohio, and it was held that the surety could not defend by recourse to the laws of Virginia.⁴

The failure of a surety to defend will not affect his right to indemnity, unless it results from negligence, in a case where an appearance would have been beneficial to the principal.⁵ The surety, when sued alone, may preserve his right to indemnity by giving his principal notice of the action and imposing upon him the responsibility of the defense. In such a case the principal is bound by the judgment.⁶ Where the surety, so sued, notifies his principal so as to enable him to defend, or to furnish the surety with a defense, the judgment is conclusive between them where there is no collusion; and, if satisfied by the surety, is the measure of damages against the principal. It would be iniquitous for the principal to stand by and see an excessive recovery against his surety, which he alone could prevent, and then set up the defense when his surety sues him.⁷ The surety's failure to defend or give the principal notice will not prejudice his right to recover from the principal what he is compelled to pay, unless he knows of a defense.⁸

¹ Commissioners v. Executors of Robinson, 1 Bailey, 151.

² Morse v. Hovey, 9 Paige, 196.

³ Rosa v. Butterfield, 33 N. Y. 665; Belmont Branch of State Bank v. Hovey, 35 N. Y. 65; Union Nat. Bank v. Wheeler, 60 N. Y. 612. See Merchants' Nat. Bank v. Com. Warehouse, 49 N. Y. 635.

⁴ Pugh v. Cameron, 11 W. Va. 523.

⁵ Doran v. Davis, 43 Iowa, 86.

⁶ Konitzky v. Meyer, 49 N. Y. 571; Hare v. Grant, 77 N. C. 203; Rice v. Rice, 14 B. Mon. 417; Thomas v. Beckman, 1 B. Mon. 29.

⁷ Hare v. Grant, *supra*.

⁸ Williams v. Greer, 4 Hayw. 235; Stinson v. Brennan, Cheves, 15. See Harley v. Stapleton, 24 Mo. 248.

On the question whether a surety can set up the principal's defense, consisting of a right of recoupment, the courts have differed in opinion. In Michigan and Illinois, the defense in behalf of the surety as well as the principal is allowed.¹ In the former state, the principal was sued with the surety, on a note given for the price of personal property sold with warranty, and it was insisted that the two defendants were not entitled to recoup the damages arising on the breach of warranty on a sale to one. Christiancy, J., said: "If recoupment were allowed on the same principle of set-off merely, this objection would be insurmountable. A set-off is in the nature of a cross-action to the full extent; it does not deny the validity of any part of the plaintiff's claim or cause of action, but sets up a separate and independent claim against the plaintiff; and the defendant is entitled to judgment upon any surplus of his claims beyond those of the plaintiff. A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross-claim like a separate and distinct debt, or item of account due from the plaintiff, but is confined to matters arising out of, or connected with the contract or transaction which forms the basis of the plaintiff's cause of action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. . . . Now the only consideration given for the note was received by . . . [one of the defendants]. [The other] . . . though a joint maker in form, would seem to have been, as between himself and the other defendant, but a surety; and it is difficult to discover any good reason why he should not be entitled to any defense, connected with the consideration, which would be available to the real principal in the transaction had he made the note and been sued alone. If the consideration paid to the former enures to bind the latter, can there be any good reason why a want or failure of that consideration should not enure to his benefit? We can discover no more reason why the defense, in the present case, should not enure to the benefit of both defendants, than

¹ McHardy v. Wadsworth, 8 Mich. 349; Waterman v. Clark, 76 Ill. 428.

if it had been a defense by way of payment, want or failure of consideration for the note, or fraud in the sale for which the note was given. It prevents circuity of action, and accomplishes full justice to all the parties without the violation of any rule of law."

In a New York case,¹ where this defense in a precisely similar case, except that the action was brought against an accommodation indorser alone, was excluded, Selden, J., said: "If we regard such defenses as resting upon a failure of consideration of the contract on which the plaintiff's action is founded, then, unquestionably, the defendant could avail himself of a breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But, if such defenses are regarded as the setting off of distinct causes of action, one against the other, then it is clear . . . that this defendant cannot avail himself of such defense." After remarking that there is no general concurrence of opinion, whether the reduction of the plaintiff's claim by recoupment rests upon partial failure of consideration, or upon the setting off of distinct claims against each other,² he continues: "A careful consideration of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. . . . In ordinary cases of breach of warranty, . . . both contracts remain binding to their full extent; and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The 'cross-claims arising out of the same transaction compensate one another,

¹ Gillespie v. Torrence, 25 N. Y. 306, affirmed in Lasher v. Williamson, 55 N. Y. 618. See Springer v. Dwyer, 50 N. Y. 19.

² Citing McAlister v. Reab, 4 Wend. 483 et seq.; S. C. in error, 8 id. 109; Batterman v. Pierce, 3 Hill,

171, 177; Ives v. Van Epps, 22 Wend. 155; Nichols v. Dusenbury, 2 Comst. 286; Van Epps v. Harrison, 5 Hill, 66; Barber v. Rose, 5 Hill, 78; Basten v. Butter, 7 East, 479; Withers v. Green, 9 How. U. S. 213.

and the balance only is recovered.' It has always been optional, . . . since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup, he could not . . . have a balance certified in his favor, nor could he maintain a subsequent action for such balance." He remarked, that under the Code of Procedure, a balance might doubtless be recovered, but that the right of election to set up a counterclaim in defense, or to bring a cross-action, still exists; and added that "it is not easy to reconcile with these established principles, the right of the defendant in this suit to avail himself of the claim which . . . [the principal] . . . may have against the plaintiff on a breach of warranty. 1. Such damages constitute a counterclaim, and not a mere failure of consideration, and, not being due to the defendant, cannot be claimed by him.¹ 2. . . . [The principal] has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make the election for him. 3. If the defendant has a right to set up the counterclaim, and have it allowed in this action, it must bar any future action by [the principal] for the breach of warranty; and as no balance could be found in the defendant's favor, he might thus bar a large claim in canceling a small one. . . . 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of [the principal], and all to remain unpaid, each of the indorsers would have the same rights as the defendants. If they were to set up the same defense, how would the conflicting claims be reconciled?"

¹ Code, § 150; *Lemon v. Trull*, 13 How. Pr. 248; 16 id. 576, note.

SECTION 2.

SURETY'S REMEDIES FOR INDEMNITY.

Action for money paid against principal — A surety has a right of action when he has paid money on his principal's debt, and to extent of payment — What is payment by surety which will give him right of action for reimbursement — Liability of principal for costs recovered against or incurred by surety — Not liable to surety for consequential damages — Contribution between co-sureties.

ACTION FOR MONEY PAID AGAINST PRINCIPAL.—It is an equitable principle of very general application, that where one person is in the situation of a mere surety for another, whether he became so by actual contract, or by operation of law, if he is compelled to pay the debt which the other, in equity and justice, ought to have paid, he is entitled to relief against the other, who was, in fact, the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of chancery, and substituted the equitable remedy of an action of assumpsit upon the common money counts, for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out and expended for his use and benefit.¹ The law implies a promise by the principal to the surety to indemnify him by refunding to him all sums of money he may have to pay as such surety. There exists in the surety an equity from the time of his assuming that relation, but no perfect right of action accrues until actual payment.² But if there is an express agreement of indemnity made by the principal, the surety must rely upon it, and none is implied.³

¹ Hunt v. Amidon, 4 Hill, 345; Exall v. Partridge, 8 T. R. 308; Tous-saint v. Martinnant, 2 T. R. 105; Taylor v. Mills, 2 Cowp. 525; Preslar v. Stallworth, 37 Ala. 402.

² Barney v. Grover, 28 Vt. 391; Sargent v. Salmond, 27 Me. 539; Choteau v. Jones, 11 Ill. 300; Rice v.

Southgate, 16 Gray, 142; Kanitzky v. Meyer, 49 N. Y. 571; Ward v. Henry, 5 Conn. 595; Collins v. Boyd, 14 Ala. 505; Thompson v. Wilson, 13 La. 133.

³ Toussaint v. Martinnant, 2 T. R. 105; Wesley Church v. Moore, 10 Pa. St. 273.

The surety can maintain an action only against his principal, and one whose legal liability is discharged. The law does not imply a promise by other persons who may be benefited by the payment.¹ There was accepted, for the United States, the individual bond of one of several partners for duties due from the firm. In this bond a surety was bound; and, having been compelled to pay it, it was held that only the partner who was principal in the bond was liable to indemnify him. When the surety paid the money he discharged only the obligation in that bond; and the principal who executed the bond, and who was relieved by the payment, was alone liable to reimburse him.² Kent, C. J., said: "There is no privity between the parties but what arises from the bond. It would be refining upon the doctrine of implied assumpsits, and going beyond every case, to consider the surety in a bond as having, by that act, a remedy at law against other persons for whom the principal in the bond may have acted as trustee. . . . The principal here was, as is stated, a surety for the debt of his firm; and that debt might perhaps have arisen by their being sureties for other persons still behind them. We can only look to the principal and surety in the bond, . . . and to the obligations resulting from that relation, because the money was paid by the plaintiff in discharge of that bond, and in exoneration of the personal representatives of . . . [the principal], who alone were legally responsible for the debt." But in an Ohio case,³ a different, and as it appears to the writer, a sounder doctrine, is advanced. One partner put the firm name to a note under seal; it was held that it should be presumed, in the absence of proof to the contrary, that it was given for a consideration received, or to be received, by the firm, and was intended and understood to bind it; that the seal was added in mere ignorance of the effect of so doing; and that, although the instrument must, at law, be considered as the deed of the partner only who sealed it, there being no proof of the assent of the other parties, yet, in equity, the firm became liable; and that, consequently, were there no

¹ Tom v. Goodrich, 2 John. 213;
Sluby v. Champlin, 4 John. 460.
See Russell v. Annable, 109 Mass.

² Tom v. Goodrich, supra.
³ Purviance v. Sutherland, 2 Ohio
St. 478.

evidence of the contract of suretyship other than that offered by the instrument itself, and that the plaintiff executed it as surety, the presumption would be that he was surety, not of the principal in the note alone, but of the firm; that whether the firm was or was not bound to the obligee, yet the fair presumption from the testimony was that the surety became such at the request of the partner who signed the note, professing to act for and in behalf of the firm; and that his request under such circumstances, and in the absence of all proof that he alone was bound, was, in law, the request of the firm; and the relation of principal and surety was thereby created between them.¹ And it was also held that, though the liability of the other partners was merged, at law, it was otherwise in equity, and, therefore, they were bound to indemnify the surety.²

When one of the two sureties becomes such at the request of his co-surety, and upon his promise that he would be put to no loss, he may recover the whole of what he may have been compelled to pay of such co-surety; such promise may be shown by parol, and is not within the statute of frauds.³

A SURETY HAS A RIGHT OF ACTION WHEN HE HAS PAID MONEY ON HIS PRINCIPAL'S DEBT, AND TO EXTENT OF PAYMENT.—Ordinarily, where a principal has made default in the payment of the debt or performance of the contract, the surety need not wait for a suit to be brought, but may, as soon as the liability arises, pay and discharge the debt. Nor is it necessary to obtain leave of the principal; the law implies a request to the surety to do this in behalf of the principal, and the surety may maintain an action for it.⁴ A right of action exists immediately in favor of a surety when he has paid the debt, or any part of it, if it was due.⁵ The surety may maintain an action of assumpsit, after he has paid the debt, as for money paid at the principal's request.⁶

¹See *Wharton v. Woodburn*, 4 Dev. & Bat. 507; approved in *Hurdle v. Hanner*, 5 Jones; *Neal v. Lea*, 64 N. C. 678.

²See *James v. Bostwick*, Wright (Ohio), 142; *Burns v. Parish*, 3 B. Mon. 8; *Hikes v. Crawford*, 4 Bush, 19.

³*Preslar v. Stallworth*, 37 Ala. 402.

⁴*Hazleton v. Valentine*, 113 Mass. 472.

⁵*Ritenour v. Mathews*, 42 Ind. 7.

⁶*Davis v. Humphreys*, 6 M. & W. 153; *Ford v. Keith*, 1 Mass. 139; *Warrington v. Farbor*, 8 East, 242.

When he pays the debt in instalments, he is entitled to sue his principal for each instalment as soon as it is paid.¹ Without the special request of the principal, the surety may pay the debt before it is due;² and after, but not before, sue his principal for the money thus paid.³ But the surety must be legally bound to pay the debt. It seems he is not bound to set up the statute of limitations where it has not run against the principal.⁴ In *Norton v. Hall*,⁵ a note was made by H, payable to F, and indorsed by the plaintiff as surety for the accommodation of both H and F. When the note fell due, the plaintiff not being able to pay it, and at the request of the creditor, gave additional security by mortgage, which the creditor held until the plaintiff paid the note, more than six years after it became due. It was held that H having failed to pay the note when due, the plaintiff had a right to make this arrangement for time with the creditor; that H could not avail himself of the statute of limitations as a defense to a suit by the plaintiff, brought within six years from the time the plaintiff paid the note. When the liability of the surety has been in good faith continued for more than six years from the time the note became due, and payment of the note is made by him, such continued liability of the surety carries with it the relation of principal and surety, and the liability of the principal to reimburse the surety for the money so paid by him.

The implied undertaking or promise of the principal is one of indemnity; and the surety has no right of action merely because the debt is not paid by the principal when due; nor until he has paid it or procured the discharge of the principal by assuming it himself.⁶ Nor can the surety recover any more than he has

¹ *Williams v. Williams*, 5 Ohio, 444; *Bullock v. Campbell*, 9 Gill, 182; *Davis v. Humphreys*, 6 M. & W. 153; *Hall v. Hall*, 10 Humph. 352.

² *Craig v. Craig*, 5 Rawle, 91; *White v. Miller*, 47 Ind. 385.

³ *Id.*; *Dennison v. Soper*, 33 Iowa, 183; *Armstrong v. Gilchrist*, 2 John. Cas. 424.

⁴ *Shaw v. Loud*, 12 Mass. 447; *Hollinsbee v. Ritchey*, 49 Ind. 261. But

see *Kimball v. Cummins*, 3 Met. (Ky.) 327; *Hatchett v. Pegram*, 21 La. Ann. 722.

⁵ 41 Vt. 471.

⁶ *Ingalls v. Dennett*, 6 Greenlf. 79; *Clark v. Foxcroft*, 7 Greenlf. 348; *Powell v. Smith*, 8 John. 249; *Shepard v. Shepard*, 6 Conn. 37; *Hearn v. Keath*, 63 Mo. 84; *Hoyt v. Wilkinson*, 10 Pick. 31; *Pizou v. French*, 1 Wash. C. C. 278; *Ellwood v. Deifendorf*, 5 Barb. 398; *Reynolds*

paid, and interest thereon;¹ and if he pays in a depreciated currency, as, for instance, confederate notes, he can recover from his principal only the market value of the payment at the time it was made, even though taken by the creditor at par.²

A payment made by a surety, in compromise of his supposed liability, upon a disputed claim against him and his principal, may be recovered by the surety from the principal, if there was an actual liability, and the principal has, or is entitled to the benefit of the payment in discharge of the original claim against him.³ He can only recover to the amount he has paid where he compounds a debt; and such will be the effect though he goes through the form of purchasing the demand and has it assigned to him. His relation of surety precludes him from speculating at the expense of his principal.⁴

v. Magness, 2 Ired. 26; *Gillespie v. Creswell*, 12 Gill & J. 36; *Thompson v. Richards*, 14 Mich. 172; *Butler v. Ladue*, 12 Mich. 173; *Hall v. Nash*, 10 Mich. 303; *Paul v. Jones*, 1 T. R. 599; *Rodman v. Hidden*, 10 Wend. 498; *Taylor v. Mills*, 2 Cowp. 525; *Kraft v. Fancher*, 44 Md. 204.

¹*Martindale v. Brock*, 41 Md. 571; *Eaton v. Lambert*, 1 Neb. 339; *Bonney v. Seeley*, 2 Wend. 481; *Robinson v. Sherman*, 2 Gratt. 178; *Hicks v. Bailey*, 16 Tex. 229; *Miles v. Bacon*, 4 J. J. Marsh. 451

²*Feamster v. Withrow*, 9 W. Va. 296; *Butler v. Butler*, 9 W. Va. 674; *Jordan v. Adams*, 7 Ark. 348; *Kendrick v. Forney*, 22 Gratt. 748; *Edmunds v. Sheahan*, 47 Tex. 443; *Gillespie v. Creswell*, 12 Gill & J. 36; *Miles v. Bacon*, 4 J. J. Marsh. 457; *Crozier v. Grayson*, 4 J. J. Marsh. 514.

³*Bancroft v. Dwinnell*, 27 Vt. 668.

⁴*Reed v. Norris*, 2 Mylne & Cr. 361; *Eaton v. Lambert*, 1 Neb. 339; *Coggeshall v. Ruggles*, 62 Ill. 401; *Pickett v. Bates*, 3 La. Ann. 627; *Crozier v. Grayson*, 4 J. J. Marsh. 514. But see *Blow v. Maynard*, 2

Leigh, 29. In *Reed v. Norris*, *supra*, a surety's representatives made an arrangement with the creditor's executors by which the debt for which the surety was bound with the principal was got rid of and discharged, and the question was whether the representatives of the surety's estate were entitled to demand more than they had actually paid, they having purchased the demand and taken an assignment. The lord chancellor said: "Now, if there had been no precedent on this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be

If the contract be tainted with usury, and the surety has knowledge of it, and pays the usury, it has been held that he cannot recover from the principal beyond what the creditor could have recovered.¹ Where, however, the creditor has recovered against the principal and surety a judgment which the surety has paid, the fact that part of the judgment is for usury will not avail the principal as a defense when sued by the surety

a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on a surety? He enters into an obligation, and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is, that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract of indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and instead of treating that settlement as a payment of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it, as such, to the full amount; thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?" *Ex parte Rushforth*, 10 Ves. 420;

Butcher v. Churchill, 14 Ves. 567; *Coggeshall v. Ruggles*, 62 Ill. 401; *Eaton v. Lambert*, 1 Neb. 339. In *Fowler v. Strickland*, 107 Mass. 552, B indorsed A's promissory note, payable on time to B's order, for A's accommodation; and A negotiated it to C for its full amount. At the maturity of the note, B having been informed by A that he could not pay it, took it up, paying C therefor half of the amount thereof. It was held that B could recover the full amount of the note of A in an action upon the note as payee.

The court said the plaintiff had the same right as any other person to purchase the note from the holder for such price as might be agreed on between them. If he purchased the entire interest of the holder in the note, he might recover the whole amount to his own use. *Gray, J.*, said: "The defendants having received the whole amount of the note at the time of its original negotiation, and being now no longer liable to any action by . . . [the holder, to whom plaintiff paid it], the amount of their liability in this action against them as makers of the note is not affected by the question how much the plaintiff paid to . . . [the holder], or whether the sum recovered will belong to . . . [such holder], or to the plaintiff." *Pinney v. McGregory*, 102 Mass. 186.

⁸ *Jones v. Joyner*, 8 Ga. 562; *Mims v. McDowell*, 4 Ga. 182.

for indemnity.¹ And this is so, though the judgment be confessed by the principal and surety.² So where a note tainted with usury was signed by a surety who was then ignorant of that fact, and who paid it after he had knowledge of it, he was held entitled to recover, unless he had been notified by the principal not to pay it. The court said, no man is *bound* to take advantage of a penal law, and avoid a contract which he ought in equity to perform.³ But a surety who pays usurious interest to obtain time to pay his principal's debt cannot collect such excessive interest.⁴ A surety joined with his principal in making a note bearing eight per cent. interest. One of the sureties died before maturity of the note. By a statute of Kentucky, it was provided that "after the death of the payer or obligor of a contract for the loan or forbearance of money at a higher rate of interest than six per cent. per annum, such contract, after maturity, and any judgment rendered thereon, shall bear six per cent. per annum." Judgment had been obtained against the surety and surviving partner for the amount of the note, at the stipulated rate of interest, which the surety paid, and then sought indemnity from the estate of the deceased partner. He insisted that inasmuch as he was compelled to pay a greater rate of interest on account of his contract of suretyship, the law would imply a promise on the part of the repre-

¹ Wade v. Green, 3 Humph. 547.

² Thurston v. Prentiss, 1 Mich. 193.

³ Ford v. Keith, 1 Mass. 139.

⁴ Thurston v. Prentiss, 1 Mich. 193; Lucking v. Gegg, 12 Bush, 298. In Thurston v. Prentiss, *supra*, a usurious loan was made by the principal, the usury being deducted from the loan. Judgments were confessed by the principal and a surety for the amount of the loan, including the usury, and another surety became security for stay of execution until the period of credit expired. The sureties paid the judgments to the creditor. In a suit by the principal debtor against the sureties, to be relieved from an indemnifying security to them, the court

said: "Appellant (the plaintiff) did not interfere to protect them (the sureties) from paying either the amount actually loaned, or the usurious portion of it, and they were not bound to litigate the matter with . . . (the creditor) to get rid of the usury. Appellant might have done so, and he was the only person interested in reducing the amount to be paid; but he neglected to interfere for the protection of his sureties, and . . . (one of them) was liable to have the judgment enforced against him. By his paying the whole, including the usury, the appellant became bound to refund, or allow the same amount in settlement with him."

sentative of his principal to indemnify him. But the court said: "To recognize this claim would be to defeat the operation of a plain and unmistakable provision of the act under which the original contract was entered into. The supposed hardship which it is insisted will result from a refusal to recognize it has no substantial existence. It is the duty of the surety to pay the debt at the maturity of the note.¹ If he had done this, he would have stopped the accrual of interest against himself; and he would have been entitled to legal interest against the principal's estate on the sum paid for its benefit. He accepted indulgence from the common creditor, with notice of the fact that the estate of the deceased debtor could not be required to pay a greater rate of interest than six per cent. per annum. He paid the additional interest for the indulgence extended to himself, and not for the use and benefit of . . . [his principal's] estate." ²

WHAT IS PAYMENT BY SURETY WHICH WILL GIVE HIM A RIGHT OF ACTION FOR REIMBURSEMENT. — The usual remedy at common law has been an action of assumpsit for money paid to the defendant's use, but sometimes the action has been special. When the action is for money paid, a technical question may be raised whether the particular mode of payment will sustain that form of action. The more important inquiry is, what is payment which will entitle the surety to immediate recourse to the principal; and when made otherwise than in money, what is the measure of the surety's recovery against the principal.

It has been loosely said in a Vermont case, that if a surety in any way extinguishes or pays the debt of the principal, it is, as far as the principal is concerned, equivalent to paying money

¹This is probably incorrect. A surety does not owe to his principal the duty to pay the debt at maturity. He is bound to the creditor to do so, but the law cannot be said to impose that duty on the surety as one he owes to his principal, who, in case of such payment, is instantly under obligation to reimburse him. But under the statute of Kentucky, the estate of the principal could not

be charged with interest beyond six per cent. after the maturity of the debt; the surety was bound to take notice of that statutory regulation. He could have saved himself from loss by paying at once when the debt became due, and he subjected himself to the greater rate by voluntarily delaying payment.

²Lucking v. Gegg, 12 Bush, 298.

for his benefit and at his request; and the surety can maintain general assumpsit for money paid against the principal.¹ An extinguishment of the debt by the creditor, at the request of the surety, without actual payment in any form, would not certainly be equivalent to the payment by the debtor in money. He is entitled to recover the amount paid, not the amount extinguished.² The voluntary payment of the debt in property, real or personal, transferred to the creditor, and received by him as payment;³ or the seizure and sale of the surety's property at the instance of the creditor, under execution, will entitle the surety to maintain an action for money paid against his principal.⁴ In such cases the value of the property at the date of the sale is properly the measure of damages, where such value does not exceed the amount due in money to the creditor.⁵ So where the creditor receives the negotiable paper of the surety as full and absolute payment and satisfaction of the debt of the principal, and not as conditional payment or collateral security, he may, without having first paid it, recover its amount of the principal.⁶ But a surety does not become entitled to sue his principal upon the ground of his having discharged the indebtedness of the principal to the creditor by giving his own absolute obligation in payment of that of the principal, so long as anything whatever remains to be done, between him and the creditor, to carry the engagement between them completely

¹ Hulett v. Soullard, 26 Vt. 295.

² Bonney v. Seely, 2 Wend. 481.

³ Ainslie v. Wilson, 7 Cow. 668; Randall v. Rich, 11 Mass. 494; Bonney v. Seely, 2 Wend. 481.

⁴ Lord v. Staples, 23 N. H. 448.

⁵ Bonney v. Seely, 2 Wend. 481; Atherton v. Williams, 19 Ind. 105; Jones v. Bradford, 25 Ind. 305.

⁶ Witherby v. Mann, 11 John. 518; White v. Miller, 47 Ind. 385; Ripley v. Moseley, 57 Me. 76; Anthony v. Percifull, 8 Ark. 494; Little v. Little, 13 Pick. 426; Day v. Stickney, 14 Allen, 255; Pearson v. Parker, 3 N. H. 366; Rodman v. Hedden, 10 Wend. 498; Lee v. Clark, 1 Hill, 56; Cornwall v. Gould, 4 Pick. 441;

Doolittle v. Dwight, 2 Met. 561; Douglass v. Moody, 9 Mass. 548; Romine v. Romine, 59 Ind. 346; Peters v. Barnhill, 1 Hill L. (S. C.) 234; Hearne v. Keath, 63 Mo. 84; Howe v. Buffalo, etc. R. R. Co. 37 N. Y. 297; Elwood v. Deifendorf, 5 Barb. 398; Bonney v. Seely, 2 Wend. 481; Van Ostrand v. Reed, 1 Wend. 424; In re Morrill, 2 Sawyer, 356; Bone v. Torry, 16 Ark. 82; Neally v. Newland, 4 Ark. 506; Mims v. McDowell, 4 Ga. 182; Hommell v. Gamewell, 5 Blackf. 5; Lyon v. Northrop, 17 Iowa, 314; Barclay v. Gooch, 2 Esp. 571; Houston v. Fellows, 27 Vt. 634.

into effect.¹ When the surety has assumed the debt in other forms, he has been allowed to recover of the principal without otherwise paying it; as where he has secured it by mortgage, and the principal has been released;² where he has replevied a judgment, and thereby discharged it.³ The surety on an administrator's bond, after a breach, was appointed administrator in place of his principal; and as administrator indorsed on the bond a receipt of money from himself for which his principal was in default, and included it in the inventory of assets in his hands; and it was held that an action would lie immediately by him against the principal for the amount so recognized as paid to his use.⁴

In England, it has been held that where a surety procured a discharge of the obligation of his principal, by giving his own bond for the debt, he could not, thereupon, before paying the bond, maintain an action against his principal for money paid.⁵ Lord Ellenborough, C. J., said: "There is no pretense for considering the giving of this new security as so much money paid for the defendant's use." He added, apparently in deference to a previous case:⁶ "Supposing even the case of the note or bill of exchange, as the current representative of money, to have been rightly decided; still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." A similar decision was made in a later case.⁷ One of the makers of a joint and several promissory note, after the same had become due, gave his bond to the holder for the amount; but before the commencement of the action no money was paid on the bond, and it was held that, until he paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution from any of the other makers of the note. Bayley and Abbott, JJ., were at first inclined in favor of recovery, on the ground that the court might properly consider the extinguishment of the debt as equivalent to money paid for the defendant's use; that

¹ *Hearne v. Keath*, 63 Mo. 84.

² *McVicar v. Royce*, 17 U. C. Q. B. 472.

529.

³ *Burns v. Parish*, 3 B. Mon. 8.

⁴ *Hazelton v. Valentine*, 113 Mass.

⁵ *Taylor v. Higgins*, 3 East, 169.

⁶ *Barclay v. Gooch*, *supra*.

⁷ *Maxwell v. Jameson*, 2 B. & A. 51.

on that ground the bond was given as money and the defendant had the benefit of it as money; but on considering the circumstances, and the previous case of *Taylor v. Higgins*, they finally decided that the action was not maintainable. Bayley, J., said: "The plaintiff in this case has paid no money. It is said, indeed, that he has given what is equivalent to it, and that it ought to be considered for this purpose as money; so it was held in *Barclay v. Gooch*.¹ But in *Taylor v. Higgins*, the court having the former case before them, held that the action for money paid could not be maintained. There are, therefore, at all events, conflicting authorities on the point, the last of which is in favor of the defendant. In *Taylor v. Higgins*, the old bond was delivered up, and the new one accepted as payment and satisfaction of the old debt. . . . Then, as the authorities differ, it becomes necessary to look at the reason of the thing. No money has yet come out of the plaintiff's pocket; *non constat* that any ever will; for if he recovers from the defendant in the present action, still it is possible that he may never pay it to [the creditor]. Then the period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for his contribution." The whole court seem to have proceeded upon the authority of *Taylor v. Higgins*, and the reason given by the court which decided that case. Holroyd, J., said: "In order to support this action the debt must have been extinguished by an actual or virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual payment; and in order to have made the giving of the bond operate as a virtual payment, the defendant must be shown to have been a party to that transaction, which was not the case." The opinions in this case are based on the apparent assumption that the bond of one of the debtors extinguished the old debt as against the other; but Abbott, J., said, incidentally, it was doubtful. It was held in *White v. Cuyler*,² that where a wife and a surety entered into a covenant with the plaintiff, which the wife failed to perform, and suit was brought

¹2 Esp. N. P. C. 571.²6 T. R. 176.

in assumpsit against the husband, that covenant would not lie, for the wife had no authority to bind him by deed; and that the covenant of the surety did not by operation of law extinguish the debt of the principal.

These cases have been supposed to recognize a distinction between negotiable paper given by a surety in payment of the principal's debt, and other forms of agreement or obligation for that purpose, based on the idea that negotiable paper is a representative of money, and that a bond is nothing like it. Such a distinction cannot be maintained; neither is money; but each has a money value; and if property may be accepted in lieu of money as a payment, and the discharge of a debt in this manner by a surety will sustain an action for money paid, why should not a payment made by the delivery of a bond, note or other valuable promise to pay money? Several American cases have recognized this distinction, though not uniformly upon the same ground.¹ These, as well as the English cases which they purport to follow, appear to turn on the technical point that payment of the debt by the surety with any new security, other than negotiable paper, will not support the action for *money paid*.

Where the plaintiff gave his promissory note for an executory consideration which failed, and the defendant, the payee, sold the note and got his pay for it, but it did not appear how or in what form, it was held that the plaintiff's action for money had and received was maintainable. The note was treated as having gone into the hands of an innocent holder, and the proceeds in the defendant's hands were, therefore, money had and received to the plaintiff's use.² An insurance broker effected, on behalf of another person, a policy under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had cove-

¹Petres v. Harmon, 8 Blackf. 112; Boulware v. Robinson, 8 Tex. 327;
Bennett v. Buchanan, 3 Ind. 47; Morrison v. Berkey, 7 S. & R. 238.
Campbell v. Jones, 4 Wend. 306; ²Colville v. Besley, 2 Denio, 139;
Cumming v. Hackley, 8 John. 202; Van Ostrand v. Reed, 1 Wend. 424;
Chapman v. Shaw, 5 Greenlf. 59.

nanted with the company to pay the premium; and then alleged that, in consideration of the premises and of such covenant, the policy was effected. The broker having become bankrupt without having paid the premium to the company, it was held that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay. This recovery was allowed under a declaration which charged that the defendants were indebted to the plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies; but it was declared that the plaintiffs were not entitled to recover such sums under the count for money paid, because the broker had not actually paid the sums, or done anything which was equivalent to payment. Bayley, J., said: "Then it is necessary to consider in what situation the broker stands, in order to ascertain whether he is not entitled to call on the assured for the premiums. The underwriters have a claim upon him for the full amount of the premiums; and if that be so, he ought to recover those premiums from those persons who have had the benefit of the policies." Park, J., said: "He undoubtedly did procure to be underwritten for them policies in this particular form; and the defendants have had the benefit of them, and they have been as beneficial to the defendants as if the premiums had been actually paid by the bankrupt to the underwriters; for the company cannot have any recourse to the defendants for the premiums, and in consequence the defendants are liable to pay a sum of money to the plaintiffs."¹

LIABILITY OF PRINCIPAL FOR COSTS RECOVERED AGAINST OR INCURRED BY SURETY.—On the subject of the principal's liability for costs incurred by the surety, it should be borne in mind that, as between the surety and his principal, it is for the default of the latter that the surety is proceeded against by the creditor. It is not a surety's duty to his principal, but the principal's duty to the surety, as well as to the other contracting party, to fulfil the contract by which they are bound. Hence, it is but just that if the surety is sued upon that contract, the principal shall be liable to him for the costs which

¹Power v. Butcher, 10 B. & C. 329.

he may have to pay in consequence of such suit; and so the law declares.¹ And this principle applies to accommodation parties to commercial paper,² but not between other parties primarily and secondarily liable.³ If a surety knows that a claim made by a creditor of his principal is just, he has no right to contest a suit brought against him as surety and litigate the same. If he does, and fails in the suit, he cannot recover of his principal the costs so incurred. He is only entitled to recover the costs of a judgment by default,⁴ and the costs of execution. These latter costs, it has been held, could not be recovered,⁵ but it is believed the surety has the same right to costs incurred on an execution as in obtaining judgment; one equally with the other is the expense of the coercive measures of the creditor to make the money in consequence of the principal's default. Redfield, C. J., said: "If, when a surety was sued upon the debt of his principal, and was unable to pay it, and the same went into judgment, and was levied upon his land, he must lose all costs recovered, and the expenses of the levy, because he did not pay the principal debt more promptly than the debtor himself, whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered [by the surety of the principal] as money paid, so equally may the costs."⁶

Whether a surety may defend, and thus increase the costs at the expense of his principal, will, as in other cases of recovery

¹ Bennet v. Dowling, 22 Tex. 660; Apgar v. Hiler, 24 N. J. L. 812; Preslar v. Stallworth, 37 Ala. 402; Hulett v. Soullard, 26 Vt. 295; Wynn v. Brooke, 5 Rawle, 106; McKee v. Campbell, 27 Mich. 497.

² Baker v. Martin, 3 Barb. 634; Hubby v. Brown, 16 John. 70; Jones v. Brooke, 4 Taunt. 464; Mott v. Hicks, 1 Cow. 513.

³ Dawson v. Morgan, 9 B. & C. 618; King v. Phillips, Pet. C. C. 350.

⁴ Holmes v. Weed, 24 Barb. 546; Short v. Galloway, 11 Ad. & El. 28. See Whitworth v. Tilman, 40 Miss.

76; Robinson v. Sherman, 2 Gratt. 178; Redfield v. Haight, 27 Conn. 31. In Steinliart v. Doellner, 24 N. Y. Super. Ct. 218, it was held that where a surety allowed a suit to go by default without notice to his principal, he should only be allowed the costs incident to the service of the summons; he should have notified his principal, and thus enabled him to settle without further costs.

⁵ Emory v. Vinall, 26 Me. 235.

⁶ Hulett v. Soullard, 26 Vt. 295; Norfolk v. American St. Gas Co. 108 Mass. 404.

over, depend on the reasonableness of his conduct in making defense and the expenditures therein.¹

Where the surety persists in making a defense after being notified by the principal that none exists, and contrary to his expressed wishes, he does so at his peril.²

THE PRINCIPAL IS NOT LIABLE TO SURETY FOR CONSEQUENTIAL DAMAGES.—In an early Massachusetts case disclosing extraordinary facts, the extent of a surety's redress against the principal was very clearly defined.³ The plaintiff signed a bond as surety for one of the defendants for the payment of duties at a custom house in 1814. The British forces took possession of the custom house and the bond; after which a monition was posted up, directing the obligors to appear at Halifax and show cause why they should not be held to pay the bonds to the captors; this was followed by the issue of a *capias* against them; the plaintiff fled to avoid the process; he went with his family to Boston and remained for a year or more; he was a merchant of respectable standing and large business; had many debts due to him which were probably lost by reason of his absence. There was a written promise of the defendant to save the plaintiff harmless from any loss he might sustain by signing the bond. The court held that all the indemnity which a surety in a bond for the payment of money can claim from the principal is the amount he has paid on account of the bond, with all such reasonable expenses as he may have been obliged to incur; not such extraordinary and remote expenses as might have been prevented by the payment of the bond. Parker, C. J., said: "The common construction of such a contract is, that if the surety is obliged to pay the bond, by suit or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to discharge his own debt.

¹See vol. I, p. 136; Downer v. Hermann, 56 N. Y. 673; Slingerland Baxter, 30 Vt. 467; Thomson v. v. Bennett, 66 N. Y. 611.

Taylor, 11 Hun. 274; Bennett v. ²Beckley v. Munson, 22 Conn. Dowling, 22 Tex. 660; Whitworth v. 299.

Tilman, 40 Miss. 76. See Dubois v. ³Hayden v. Cabot, 17 Mass. 169.

But extraordinary expenses, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract. Thus, if a surety, by reason of being obliged to pay money for his principal, becomes embarrassed in his business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for his consequential misfortune. It is not the natural and necessary effect of his becoming surety, but is occasioned by his undertaking to do what he was not in a condition to perform. So any loss or expense, occasioned by an attempt to avoid payment of an obligation, cannot have been contemplated by the parties as a subject of indemnity; the true meaning of the contract being, that if the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses. Flight, to avoid payment of the debt, is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon his surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison,¹ or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity; because they might be avoided by payment, which he must be considered as stipulating that he was able to make. The indefinite nature and extent of such damages as are claimed in the present action is also a sufficient objection to the character of the action itself. If a surety, who flies to avoid payment, can recover an indemnity for all the consequences of his flight, such as the loss of business, loss of debts, expenses of removing and supporting his family, the principal would have no means of protecting himself against extravagant claims; so that the danger would rather lie in having a surety, than in becoming one, which has heretofore been thought to be attended with the most hazard." ²

CONTRIBUTION BETWEEN CO-SURETIES.—The right of one surety to call upon his co-surety for contribution arises from a principle of equity growing out of the relation which the parties have assumed towards each other. It has been supposed not to

¹ Powell v. Smith, 8 John. 249.

² Vance v. Lancaster, 3 Hayw. 130.

result from any implied contract between them, but an acknowledged principle of natural justice which requires that those who voluntarily assume a common burden should bear it in equal proportions.¹ This equity attaches when the relation commences; and may at once be invoked when one surety has been compelled to pay the debt.² It is a right, however, now recognized and enforced at law; because the equitable principle has been so long and so generally acknowledged and enforced, that persons in placing themselves under circumstances to which it applies, may be supposed to act under contract implied from the universality of that principle.³ By becoming sureties, each impliedly promises the others, in contemplation of law, that he will faithfully perform his part of the contract, and pay his proportion of loss in case of the insolvency of the principal;⁴ in other words, that he will pay his proportion of the debt if the principal neglects to pay it, or will save his co-surety harmless from injury by being obliged, through the former's neglect, to pay more than his proper proportion of it. This obligation does not arise solely out of the consideration that the surety, so liable, has been relieved of a burden; but also from the consideration that he engaged to indemnify his co-surety against loss arising from neglect to pay his own share in case of the principal's delinquency.⁵

All sureties, of the same principal, in respect to the same debt or liability, are not co-sureties. It is not sufficient that both parties are sureties; they must occupy the same position in respect to the principal, and without equities between themselves, giving advantage to one over the other.⁶ A surety in a note cannot claim contribution from an indorser as such, but proof, and even parol proof, is admissible to show that they are

¹ Wayland v. Tucker, 4 Gratt. 267; White v. Banks, 21 Ala. 705; Russell v. Failor, 1 Ohio St. 327; Dent v. King, 1 Ga. 200; Warner v. Morrison, 3 Allen, 566; Camp v. Bostwick, 20 Ohio St. 337; Roberts v. Adams, 6 Porter, 361; Wells v. Miller, 66 N. Y. 255.

² Wayland v. Tucker, *supra*.

³ Lansdale v. Cox, 7 T. B. Mon.

401; Bachelder v. Fisk, 17 Mass. 464; Morton v. Coons, 6 N. Y. 32; Agnew v. Bell, 4 Watts, 31; Craythorne v. Swinburn, 14 Ves. 160; Paulin v. Kaighn, 29 N. J. L. 480.

⁴ Hickborn v. Fletcher, 66 Me. 209.

⁵ Crosby v. Wyatt, 23 Me. 156; Howe v. Ward, 4 Greenlf. 195; Bradley v. Burwell, 3 Denio, 61.

⁶ Wells v. Miller, 66 N. Y. 255.

co-sureties.¹ Where one indorses a note before it is issued, he is *prima facie* a guarantor, and may treat all the makers as principals, for his indemnity, though he knew a part were sureties; the actual relation of such indorser to the other parties may be shown by parol.² So it may be shown that though two persons sign the same obligation as sureties for a third, one of them signed at the request of the principal, and the other as surety of the first surety, and thus that they are not co-sureties as between themselves. In that case, the first surety stands in the relation of principal to the second surety, and is responsible to him for whatever he is compelled to pay, and has in no event any claim against him for contribution.³

An agreement made between parties prior to or contemporaneously with their executing a written obligation as sureties, by which one agrees to indemnify the other from loss, does not contradict the terms nor vary the legal effect of the written obligation; and it may be proved by parol evidence. Such promise, although not in writing, is a bar to an action by the party making it against his co-surety for contribution.⁴ In *Longley v. Griggs*,⁵ the plaintiff, as surety, was one of the makers of a note, and paid it; the defendant was a guarantor by indorsement on the back before it was delivered to the payee. The note was given in payment of a similar note made by the same parties and indorsed by the defendant as surety. It was contended that the defendant was liable to contribution because he indorsed the old note as surety, and the same relationship continued after the new note was given. It was held, however, that the defendant did not continue in the same relation to the note. He made a new engagement, and had a right to do so; he did so by filling up the indorsement with the engagement of guaranty merely.

One who becomes surety in the course of legal proceedings against the principal, has no right of contribution against the

¹ *Nurre v. Chittenden*, 56 Ind. 462; *Dawson v. Petway*, 4 Dev. & Batt. 396.

² *Hamilton v. Johnson*, 82 Ill. 39; *Keith v. Goodwin*, 31 Vt. 268; *Longley v. Griggs*, 10 Pick. 121.

³ *Cutler v. Emery*, 37 N. H. 567;

Byers v. McClanahan, 6 Gill & J. 250; *Harris v. Warner*, 13 Wend. 400; *Thompson v. Sanders*, 4 Dev. & Batt. 404; *Carter v. Black*, 4 Dev. & Batt. 425.

⁴ *Barry v. Ransom*, 12 N. Y. 462.

⁵ 10 Pick. 12.

original security for the debt; but, on the contrary, the latter is entitled to be subrogated to the creditor's right against such later surety, as in the case of bail, bonds for prison bounds, on appeal or injunction.¹

A judgment having been recovered against one surety, and an execution levied on his property, he executed a forthcoming bond with another of the sureties against whom no judgment had then been obtained as his surety; and the bond was forfeited; it was held that the surety in the forthcoming bond, having paid the debt, was entitled to contribution from the other sureties in the original obligation. It was held also to be a general rule, that if one surety is insolvent his share shall be apportioned among the solvent sureties; but the surety in the forthcoming bond having, by executing that bond, released the property of the principal in the bond, and that principal having become insolvent, his surety was not entitled to recover from the other sureties in the original bond any part of the share of his principal in the forthcoming bond as one of the sureties in the original; and held further, that the surety in the forthcoming bond was not entitled to decree for the costs of awarding the execution on that bond, either against the principal in the original or his sureties, but only against the principal in the forthcoming bond.²

W, a deputy of L, sheriff, gave a bond to his principal, with five sureties, for the faithful discharge of his duties; L not being satisfied with this security, W and three other persons as his sureties gave a second bond to L, with like condition, a memorandum being indorsed on this second bond at the time of its execution, in conformity with a previous agreement, that L should not resort to the second bond for indemnity for the misconduct of the deputy so long as the sureties in the first bond should be residents of the state, and it should appear that he could be indemnified without recourse to the sureties in the second bond. L recovered judgment on the first bond against

¹ Chaffin v. Campbell, 4 Sneed, 184; Mitchell v. DeWitt, 25 Tex. 180 (supplement); Osborne v. Cunningham, 4 Dev. & Batt. 423; Hartwell v. Smith, 15 Ohio St. 200; Brandenburg v. Flynn, 12 B. Mon. 397.

² Preston v. Preston, 4 Gratt. 88; Dunlap v. Foster, 7 Ala. 734; Hammock v. Baker, 3 Bush, 203; Smith v. Bing, 3 Ohio, 33; Hartwell v. Smith, 15 Ohio St. 200.

the sureties therein bound for the amount of damages sustained by him by reason of the deputy's misconduct in office; held, that the sureties in the first bond had no right to contribution from the sureties in the second ¹

There is an exception, in cases of tort,² to the rule that defendants standing *equali jure* are bound to contribute. But it is not universally true that there is no contribution between trespassers or wrongdoers. If one of several parties who have engaged in an act which, when done, appears to them right and lawful, but which turns out to be an injury to some third party, pay the damages which such third party may recover on account of the injury so done, he may maintain a suit for contribution; and all parties to the transaction may be compelled to pay their just proportions respectively of the sums so paid. As decided in *Adamson v. Jarvis*,³ the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the party seeking redress must be presumed to have known that he was doing wrong. When the parties think they are doing a legal and proper act, contribution will be compelled; but when they are conscious that they are doing a wrong, the courts will not interfere.⁴

To produce equality and give sureties a reciprocal right of contribution, the legal character and effect of their undertakings should be in substance the same; they should be bound to the performance of the same duty, or the payment of the same debt, and in favor of the same party. When this is the case, they are co-sureties, whether they all sign the same instrument, or sign different instruments, at the same or different times.⁵ The guardian of a minor, who had given a guardianship bond in the form required by law, was subsequently required, in view

¹ *Harrison v. Lane*, 5 Leigh, 414.

² *Dent v. King*, 1 Ga. 200.

³ 4 Bing. 66.

⁴ *Achison v. Miller*, 2 Ohio St. 203.

⁵ *Perrins v. Ragland*, 5 Leigh, 552; *Whiting v. Burk*, L. R. 6 Ch. 342; affirming L. R. 10 Eq. Ca. 539; *Kellar v. Williams*, 10 Bush, 216; *Deering v. Earl of Winchelsea*, 2 B. & P. 270; *Woodworth v. Bowes*, 5 Ind.

276; *Breckenridge v. Taylor*, 5 Dana, 110; *Bosley v. Taylor*, 5 Dana, 157; *Craig v. Ankeney*, 4 Gill, 225; *Norton v. Coons*, 3 Denio, 130; *Warner v. Morrison*, 3 Allen, 566; *Stout v. Vause*, 1 Rob. (Va.) 169; *Bentley v. Harris*, 2 Gratt. 357; *Harris v. Ferguson*, 2 Bailey L. 397; *Cobb v. Haynes*, 8 B. Mon. 137; *Bell v. Jasper*, 2 Ired. Eq. 597.

of a late increase of the estate, to give a new bond in a larger penal sum than the first; such bond was accordingly filed with a new surety. It was held that both bonds were valid, and the sureties in them co-sureties; that, being bound in different sums, they were, as between themselves, compellable to contribute in proportion to the different penalties in their respective bonds.¹

Where several principals become bound for the same debt, they stand in the relation of co-sureties.² Where a debt is contracted by several persons for a common purpose, and one of them pays the whole debt, he may sue each of the others separately at law for his aliquot share of the debt.³ Six persons drew a bill of exchange upon which money was received by them; and at the same time they executed an instrument in which they recited that the bill was drawn for the mutual benefit of all the parties to it, and that each would bear an equal proportion in its payment, each paying his separate portion. It was held that each was surety for the others for all above his own share in the bill; that they were co-sureties for all above the sum they were individually liable for.⁴

Indorsements upon negotiable paper for the accommodation of the drawer import not a joint, but a several and successive liability, each indorser being responsible to all who succeed him.⁵

Co-sureties are always supposed to assume the same risk, and to stand relatively to the principal in the same situation; neither obtaining any benefit by the transaction, and each equally subjecting himself to responsibility.⁶ Where one surety, without the knowledge of his co-surety, by previous arrangement with the principal debtor, received one-half of the sum borrowed, he was denied contribution from the other surety, who under-

¹ *Loring v. Bacon*, 3 Cush. 465; *Armitage v. Pulver*, 37 N. Y. 494.

² *Chipman v. Merrill*, 20 Cal. 130; *Hetfield v. Dow*, 27 N. J. L. 440; *Craft v. Mott*, 4 N. Y. 603; *Hayes v. Morrison*, 38 N. H. 90.

³ *Parker v. Ellis*, 2 Sandf. 223.

⁴ *Martin v. Baldwin*, 7 Ala. 923.

⁵ *Bank of N. S. v. Bierne*, 1 Gratt. 239; *McCarty v. Roots*, 21 How. U.

S. 432; *Spence v. Barclay*, 8 Ala. 581; *McCune v. Bells*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 587; *Sherrod v. Rhodes*, 5 Ala. 683; *McDonald v. Magruder*, 3 Pet. 470. But see *Daniel v. Nickae*, 2 Hawks, 590; *Richards v. Simms*, 1 Dev. & Bat. 48; *Currier v. Fellows*, 27 N. H. 366.

⁶ *McPherson v. Talbott*, 10 Gill & J. 499.

took the responsibility in confidence that his associate was equally with him exposed to risk.¹

If a surety is entitled to contribution, his right of recovery, and the amount to which he is entitled from his co-sureties, are based on and governed by the maxim that "equality is equity." Where all are solvent, each is responsible to his co-surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties.² If one of several has paid the entire debt, each of the others is severally liable for his proportion, to which interest may be added.³ If, after each surety has contributed his share of the debt, to one of them is refunded the amount paid by him, he is answerable to the others for a ratable share of it.⁴ And where one has been obliged to pay costs to the creditor, he is entitled to recover from his co-surety the same proportion of them as of the debt paid.⁵ The failure to pay the debt which occasioned the costs is to be imputed to all who were liable, and sued; and the extent of their neglect is to be measured by the respective proportions which they were bound to pay in reference to each other at the time of the suit brought. They were bound to contribute each his proper share towards the debt; and the costs which resulted from their neglect to pay the debt must be apportioned among them in proportion to the measure of neglect imputable to them. The same equitable principles which govern among co-promisors, in reference to the debt for which they are jointly liable, equally apply in case of costs recovered in a judgment against them jointly for non-payment of their joint debt.⁶ So a surety may recover in a suit against a co-surety a proportionate share of the taxable costs which he was compelled to pay in the suit against himself, for each is equally in fault for not paying the debt;⁷ and also for costs and expenses of

¹ *McPherson v. Talbott*, 10 Gill & J. 499.

² *Rodgers v. McClure*, 4 Gratt. 81; *Davies v. Humphreys*, 6 M. & W. 153; *Norton v. Coons*, 3 Denio, 130; S. C. 6 N. Y. 33; *McDonald v. Magruder*, 3 Pet. 470.

³ *Miles v. Bacon*, 4 J. J. Marsh. 463; *Gibbs v. Bryant*, 1 Pick. 118.

⁴ *Smith v. Hicks*, 5 Wend. 48. See *Gould v. Fuller*, 18 Me. 364.

⁵ *Hayes v. Morrison*, 38 N. H. 90; *Davis v. Emerson*, 17 Me. 64.

⁶ *Hayes v. Morrison*, *supra*.

⁷ *Wynn v. Brooke*, 5 Rawle, 106; *Kemp v. Finden*, 13 M. & W. 421; *Briggs v. Boyd*, 37 Vt. 534. See *contra*, *Knight v. Hughes*, 3 C. &

defending a suit, if the defense is reasonably and judiciously made.¹ Where one of the sureties paid the debt, and took the assignment of a mortgage by which it was in part secured, he was allowed against his co-surety a commission of five per cent. on the value of the premises, and the expenses of foreclosure and sale.² But it has been held in New Hampshire, that unless there is some agreement, there is no right to contribution in respect to other expenses than the costs collected of a suit against a surety. In the absence of any agreement to that effect, either of the parties, incurring expense in defending the suit, will incur it on his own account. The fact that others have a common interest with himself in the defense will not of itself authorize him to incur expense upon their joint account.³

In equity, an insolvent surety is ignored in the apportionment of the debt among the sureties; so that if one surety has paid the debt and sues for contribution, the amount which the insolvent surety should pay must be shared and borne by the others, as though such insolvent had never been bound.⁴ But at law in some states this equity has not yet been adopted, and the amount is ascertained which each co-surety should contribute without regard to the insolvency of any one or more of the sureties.⁵ In other states this principle of equity is in force at law.⁶ On the question of contribution between co-sureties, partners who signed in the partnership name are to be regarded as but one surety.⁷

It is no objection to an action for contribution that the plaintiff has received a partial indemnity from the principal by an assignment of property; the property so assigned enures to the benefit

P. 467; *Bosley v. Taylor*, 5 Dana, 157; *Kenna v. George*, 2 Rich. Eq. 15.

¹ *Fletcher v. Jackson*, 23 Vt. 581; *Marsh v. Harrington*, 18 Vt. 150. See *Comegys v. State Bank*, 6 Ind. 357; *Walker v. Hatton*, 10 M. & W. 249; *Greely v. Dow*, 2 Met. 176; *Penley v. Watts*, 7 M. & W. 601.

² *Livingston v. Van Rensselaer*, 6 Wend. 63.

³ *Hayes v. Morrison*, *supra*.

⁴ *Samuel v. Zachery*, 4 Ired. 377; *Parker v. Ellis*, 2 Sandf. 223.

⁵ *Samuel v. Zachery*, *supra*; *Cobb v. Haynes*, 8 B. Mon. 137; *Dodd v. Winn*, 27 Mo. 501.

⁶ *Mills v. Hyde*, 19 Vt. 59; *Currier v. Baker*, 51 N. H. 613; *Bosley v. Taylor*, 5 Dana, 147; *Harris v. Ferguson*, 2 Bailey, 397; *Strong v. Mitchell*, 19 Vt. 644; *Magruder v. Admire*, 4 Mo. App. 133.

⁷ *Chaffee v. Jones*, 19 Pick. 260.

of all the sureties, and the defendant is liable for his proportion of the balance paid by the plaintiff beyond the indemnity.¹ Where a surety had a deed of trust of certain property as an indemnity, executed by the principal, and the surety neglected to have it registered, and the property was sold by other creditors, it was held that he should lose his right to contribution.² To the extent that such security would save the sureties from loss, neglect of the surety in preserving, or his voluntary act of relinquishing it, will detract from his right to contribution.³ And the presumption is that the securities surrendered are of the value expressed upon their face, and the burden of showing that they were of less value rests upon the party surrendering them.⁴

A surety may take securities from his principal to indemnify himself; and if he bring an action against his co-surety, for contribution, the fact of his having such securities will not bar a recovery; but after such recovery the defendant is entitled to enforce his right of subrogation, and so obtain the benefit of the securities. If, before action brought for contribution, the securities, held for indemnity, are converted into money, it is a payment *pro tanto* to the surety, by the original debtor, and so far an extinguishment of the liability. A co-surety sued for contribution may show that money has been so realized.⁵

No suit against a co-surety for contribution can be maintained unless the plaintiff has paid more than his share of the debt.⁶ Park, B., said: "This appears to us to be very reasonable; for if a surety pays part of the debt only, and less than his moiety,

¹ Bachelder v. Fiske, 17 Mass. 463; John v. Jones, 16 Ala. 454.

² Pool v. Williams, 8 Ired. 286.

³ Taylor v. Morrison, 26 Ala. 728; Teeter v. Pierce, 11 B. Mon. 399; Ramsey v. Lewis, 30 Barb. 403; Roberts v. Sayre, 6 T. B. Mon. 188; Currier v. Fellows, 27 N. H. 366; Goodloe v. Clay, 6 B. Mon. 236; Chilton v. Chapman, 13 Mo. 470; Steele v. Mealing, 24 Ala. 285.

⁴ Paulin v. Kaighn, 29 N. J. L. 480; Fielding v. Waterhouse, 40 N. Y. Sup. Ct. 424.

⁵ Paulin v. Kaighn, *supra*; Anthony v. Percifull, 8 Ark. 494. See Smith v. Steele, 25 Vt. 427; White v. Banks, 21 Ala. 705. Compare Morrison v. Taylor, 21 Ala. 779; Goodloe v. Clay, 6 B. Mon. 236; Ramsey v. Lewis, 30 Barb. 403.

⁶ Ex parte Gifford, 6 Ves. 805; Smith v. State, 46 Md. 617; Fletcher v. Grover, 11 N. H. 368; Camp v. Bostwick, 20 Ohio St. 337; Morgan v. Smith, 70 N. Y. 537.

he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until he has paid more than his proportion, either of the whole debt, or that part of the debt which remains unpaid of the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that he has no equity to receive a contribution, and consequently no right of action which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, has paid a portion of the debt, and the principal, within six years, has paid the residue, the statute of limitations will not run from the payment by the surety, but from the payment of the residue by the principal; for, until the latter date, it does not appear that the surety has paid more than his share. . . . The right of action having been once established, it seems clear that, when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing.¹ If he satisfies a debt or discharges a liability at a discount, he can only claim contribution on the basis of the amount he actually pays.²

One of two sureties of an insolvent administrator bought up legacies for which the sureties were bound at a discount, and it was held that he could only charge his co-surety for his proportion of what was paid for the legacies and of the expense of purchasing them.³ And if the payment is made in property or in depreciated currency, doubtless the same rule should apply between co-sureties as between surety and principal.⁴ Nor can a surety claim contribution until he has actually made payment; and what is payment between surety and principal is such between surety and surety.⁵ A surety released by the

¹ *Davies v. Humphreys*, 6 M. & W. 153.

² *Sinclair v. Redington*, 56 N. H. 146. See *Comegys v. State Bank*, 6 Ind. 357.

³ *Tarr v. Ravencroft*, 12 Gratt. 642.

⁴ See ante, pp. 580, 584; *Edmunds*

v. Shehan, 47 Tex. 443; *Jones v. Bradford*, 25 Ind. 305; *Hickman v. McCurdy*, 7 J. J. Marsh. 558.

⁵ Ante, p. 579; *Chandler v. Barnard*, 14 Pick. 285; *Atkinson v. Stewart*, 2 B. Mon. 348; *Pinkston v. Talliaferro*, 9 Ala. 547; *Brisendine*

creditor with the consent of his co-surety is not liable for contribution.¹ If a surety discharge one of his co-sureties, such discharge is equivalent only to payment of his share.² A surety who voluntarily pays money on a void note or obligation is not entitled to contribution.³ So where one of two sureties who pays a judgment obtained against himself, on a cause of action which was barred as to the other at the date of the judgment, he can claim no contribution.⁴ But if a suit be brought against one of two sureties on a note before the statute of limitations could be successfully interposed as a defense by either, and judgment is obtained after the time when the statute would have furnished a defense in a suit then commenced, and this judgment is satisfied, the right to contribution is not barred.⁵ So if the estate of a deceased surety is discharged from liability to a creditor on account of the debt not being presented within the period allowed by law for that purpose, it is still liable to contribution in favor of a surety who afterwards pays the debt.⁶ The right of action by the surety for contribution does not accrue at the breach of the contract with the creditor, but upon his payment of the money.⁷ The common law, which has adopted the equitable principle of contribution by allowing an action upon an implied assumpsit, confines the remedy to those cases in which there is a just and equitable ground for contribution.⁸ It has been denied where the surety who seeks contribution is indebted to the principal for more than he has paid;⁹ or has been otherwise reimbursed.¹⁰

If a surety has no notice of a suit against a co-surety, he is not bound by the judgment therein.¹¹ But a joint judgment against the sureties is conclusive as between themselves that a

v. Martin, 1 Ind. 286; Nowland v. Martin, 1 Ired. 307; White v. Carlton, 52 Ind. 371.

¹ Bouchaud v. Dias, 3 Denio, 238.

² Currier v. Baker, 51 N. H. 613.

³ Russell v. Failor, 1 Ohio St. 327.

⁴ Shelton v. Farmer, 9 Bush, 314.

⁵ Cutter v. Emery, 37 N. H. 567; Boardman v. Page, 11 N. H. 437.

⁶ Camp v. Bostwick, 20 Ohio St.

⁷ Wood v. Leland, 1 Met. 387; Evans v. Evans, 16 Ala. 465.

⁸ Russell v. Failor, 1 Ohio St. 327; McCrary v. Parks, 18 Ohio St. 1.

⁹ Bezell v. White, 13 Ala. 422. But see O'Brien v. Karing, 57 N. Y. 649.

¹⁰ Mason v. Lord, 20 Pick. 447.

¹¹ Arnett v. Terry, 35 N. Y. 256; Briggs v. Boyd, 37 Vt. 534; Thomas v. Hubbel, 35 N. Y. 120.

cause of action exists against them.¹ A judgment against one is also conclusive against another, if he is notified and has an opportunity to defend.² And where a judgment has been recovered against a part of the sureties, and they have paid it, it is competent evidence of the amount they were obliged to pay, though not of their liability.³

SECTION 3.

EXPRESS INDEMNITIES.

Damages the gist of the action — What may be recovered as damages — Between what wrongdoers there may be contribution or indemnity — Contracts varying from indemnity but intended for that purpose.

DAMAGES THE GIST OF THE ACTION.— An agreement to indemnify against or save harmless from damages is not broken unless there has been actual loss or injury from the cause against which the indemnity is given.⁴ In such cases damages are the gist of the action, and no cause of action arises until there is a breach resulting in actual injury.⁵ The agreement for indemnity, however, may be so drawn that though intended exclusively as such, it will admit of a technical breach before there is cause for recovery of substantial damages; in other words, before the event occurs against which the agreement is intended to protect. Such would be a note given as indemnity, but payable before a cause of action for indemnity had accrued. A suit could be maintained, but only nominal damages could be recovered; for the true consideration and purpose of the note would be open

¹ Waller v. Campbell, 25 Ala. 544.

² Love v. Gibson, 2 Fla. 598.

³ Fletcher v. Jackson, 23 Vt. 581.

⁴ Churchill v. Hunt, 3 Denio, 326; Aberdeen v. Blackmar, 6 Hill, 324; Coe v. Rankin, 5 McLean, 354; Wicker v. Hoppock, 6 Wall. 94; Little v. Little, 13 Pick. 426; Crippen v. Thompson, 6 Barb. 532; Conner v. Bean, 43 N. H. 202; Lott v. Mitchell, 32 Cal. 23; Gardner v. Cleveland, 9 Pick. 336; Hall v. Cresswell, 12 Gill & J. 38; Lyman v. Lull, 4 N. H. 495;

Jeffers v. Johnson, 21 N. J. L. 73;

Chace v. Hinman, 8 Wend. 452;

Weller v. Eames, 15 Minn. 461; Gen-

nings v. Norton, 35 Me. 308;

Churchill v. Moore, 15 Kan. 255;

Ewing v. Reilly, 34 Mo. 113; Doug-

lass v. Clark, 14 John. 177; Hussey

v. Collins, 30 Me. 190; Scott v. Tyler,

14 Barb. 202; Abeles v. Cohen, 8

Kan. 180; Jones v. Childs, 8 Nev.

121. See Conkey v. Hopkins, 17

John. 113.

⁵ Id.

to proof.¹ If, however, actual damages are sustained at any time before the trial, they may be proved and the recovery increased accordingly.² A covenant against incumbrances is another instance of such an agreement for indemnity of which there may be a technical breach giving a right to recover nominal damages before actual injury.³

In all cases of conditions or covenants to indemnify and save harmless from damages, the proper plea is *non damnificatus*, and then the maintenance of the action depends on the proof of damages.⁴ But it is otherwise where the condition or agreement is to discharge or acquit the plaintiff from some particular thing; for there the defendant must set forth affirmatively the special manner of performance.⁵

The authorities are by no means uniform in the construction of agreements of similar nature and words, in determining whether they shall be deemed to be agreements of indemnity merely, or are agreements against the existence of a certain condition, or requiring some positive act of performance. If the contract deviates the least from a simple one to indemnify against damages, even though indemnity is the sole object of the contract, and where actual loss may be sustained in consequence of a breach, it is generally treated as belonging to the latter class, and damages are recoverable accordingly.⁶ Where

¹ Boynton v. Twitty, 53 Ga. 214.

² Haseltine v. Guild, 11 N. H. 390; Osgood v. Osgood, 39 N. H. 209; Anthony v. Percifull, 8 Ark. 494; Boynton v. Twitty, 53 Ga. 214; Day v. Stickney, 14 Allen, 255; Witherby v. Mann, 11 John. 518; Cornwall v. Gould, 4 Pick. 444; Douglass v. Moody, 9 Mass. 548; Child v. Eureka Powder Works, 44 N. H. 354.

³ Willson v. Willson, 25 N. H. 229; Brooks v. Moody, 20 Pick. 474; Van Slyck v. Kimball, 8 John. 198; Stannard v. Eldridge, 16 John. 254.

⁴ 1 Saund. 117, note 1; Holland v. Malken, 2 Wils. 126; Cox v. Joseph, 5 T. R. 307; Archer v. Archer, 8 Gratt. 539; Holmes v. Rhodes, 1 Bos. & P. 640 and note; Harmony v.

Bingham, 12 N. Y. 113; Thomas v. Allen, 1 Hill, 146.

⁵ Id.; Cro. Eliz. 914; Port v. Jackson, 17 John. 239; Andrus v. Waring, 20 John. 153; Coombs v. Newton, 4 Blackf. 120; McClure v. Erwin, 3 Cow. 332; Woods v. Rowan, 5 John. 42.

⁶ Conner v. Bean, 43 N. H. 202; In the Matter of Negus, 7 Wend. 502; Gilbert v. Wiman, 1 N. Y. 553; Hall v. Nash, 10 Mich. 303; Churchill v. Moore, 15 Kan. 255; Dye v. Mann, 10 Mich. 291; Jarvis v. Sewall, 40 Barb. 449; Webb v. Pond, 19 Wend. 423; Jones v. Child, 8 Nev. 121; Lewis v. Crockett, 3 Bibb, 196; Ranson v. Copland, 2 Sandf. Ch. 254; Willett v. Stewart, 43 Barb. 98;

the undertaking is simply to indemnify against damages, and a cause of action exists, the measure of damages is the actual injury of the kind indemnified against; where the undertaking is to acquit and discharge the promisee, or that some act or event shall or shall not transpire, the damages will be ascertained with reference to the benefit or immunity the promisee would have received if the contract had been performed.¹ In the former case the principle is adhered to that compensation will be limited to actual injury; but in the latter not only will such compensation be given, but in many cases compensation will be allowed for probable injury.² Some of the cases in which damages for such probable injury are allowed will hereafter be referred to.

WHAT MAY BE RECOVERED AS DAMAGES.—The damages allowable on express agreements for indemnity will depend on the scope of the undertaking; they can be only such as naturally and proximately proceed from the cause referred to in the indemnity.³ When the indemnity is general against the costs and expenses of a certain act, or “against all actions, suits, costs, damages and demands whatsoever for or by reason or on account thereof,” it extends to the costs of defending a groundless suit for the act, in which the indemnified party succeeded.⁴ But they must be of the nature contemplated by the agreement, as well as the proximate consequence of the cause stated. A plaintiff, in a writ of attachment, desiring to attach goods which had been put on board a vessel, gave a bond to the owner of the vessel conditioned to pay “all expenses, damages and charges which might be incurred by the owner or master of the schooner, or to which they might be subjected, for unloading said goods from said vessel, and for all necessary de-

Churchill v. Hunt, 3 Denio, 326;
 Jeffers v. Johnson, 21 N. J. L. 73;
 McDonald v. Bauskett, 10 Rich. 178;
 Weller v. Eames, 15 Minn. 461;
 Strob v. Kimmel, 8 Watts, 157;
 Penny v. Foy, 8 B. & C. 11; War-
 wick v. Richardson, 10 M. & W. 284;
 Pond v. Warner, 2 Vt. 532; Morrison
 v. Berkey, 7 S. & R. 238.

¹Wicker v. Hoppock, 6 Wall. 94.

²Gilbert v. Wiman, 1 N. Y. 552.

³Hallock v. Belcher, 43 Barb. 199.

⁴Trustees of Newburgh v. Galatian, 4 Cow. 340; Chamberlain v. Beller, 18 N. Y. 115; Chilson v. Downer, 27 Vt. 536.

tention of said vessel for said purpose." It was held that the obligee was not entitled to recover upon the bond, in addition to the expenses, damages and charges directly and immediately incurred by him in unloading the merchandise from the schooner, compensation for legal expenses, to which he was subjected in defending a suit in another state, commenced against the schooner by the consignee of the goods.¹

An agreement to keep harmless and pay all damages in case of levying on and selling certain property on an execution, was held to apply though the property was replevied before sale; that the officer was entitled to recover the costs, attorney fees, and expenses of defending the replevin suit, as well as the damages adjudged therein, although the obligor had notice of the commencement and pendency of such suit.² It was considered that the bond was intended to indemnify the officer for taking and holding, and also for selling it. It was deemed proper also to allow the costs and expenses of defending the suit, because, as the court say, "the obligors had notice of the suit, and had agreed that it should be defended." And they add, "clearly, this entitled the constable, if he chose to do so, to defend the suit, and recover from the obligors his costs, attorney fees, and expenses. Nothing less than this would be an indemnity, according to the terms of the bond; and notice to one of the joint obligors was sufficient."³

In a late English case, it appeared that the assignee of a lease undertook to indemnify the assignor against breaches of the covenants and conditions under which the assignor held the premises. No assignment was executed, but the indemnifying party entered and held possession of the premises until the agreement expired; he let them fall out of repair, and the assignor was sued by his landlord for such dilapidations. After the assignee had notice of the action, the assignor paid money into court, which the jury found to be sufficient. It was held, in an action brought by him against his assignee, on his promise of indemnity, that the plaintiff was entitled to recover, as damages, the extra costs necessarily incurred by him over and above the taxed costs paid to him in defending the former action.⁴

¹ Hallock v. Belcher, 42 Barb. 199.

² Finckle v. Evan, 25 Ohio St. 82.

³ Id.

⁴ Howard v. Lovegrove, 40 L. J. Exch. 33; L. R. 6 Exch. 43; S. C. 23

L. T. N. S. 396; 19 W. R. Exch. 188.

An interesting case on this point occurred in Maine, and it appears to have been decided on thorough consideration. It was an action of debt on a bond conditioned "to fully indemnify and save harmless" the plaintiff "from all loss, damage and harm whatsoever by reason of a suit for the infringement of any patent, in selling paper collars which the plaintiff has had or may hereafter have" of the defendants, and "to pay all fair and reasonable charges for expenses in defending said suit." The case is thus stated by the court: "In 1867, the plaintiff, a dealer in gentlemen's clothing, was the agent of the defendants in Maine for the sale of paper collars; the Union Paper Collar Company commenced a suit against the plaintiff for an alleged infringement of their patent in the sale of these collars, and on December 17, 1867, attached upon their writ in that suit the plaintiff's entire stock of goods, of the value of \$2,750; the plaintiff immediately notified the defendants of the attachment, and used his best efforts to procure the release of his stock from the attachment; but he was unable to do so until January 6, 1868, when he succeeded in procuring receiptors only by mortgaging the stock to secure them; the plaintiff incurred reasonable and necessary expenses in two visits to the defendants in New York, the last time with counsel, resulting in the giving of the bond in suit; the plaintiff contracted a severe illness on his return from New York, in consequence of which his store remained closed until the first of February, 1868; his business credit, which was previously good, was destroyed by the attachment; he has been obliged to retain the greater part of the goods mortgaged to secure his receiptors, and the goods have depreciated twenty-five per cent; he lost the profits of his store during the time that it remained closed, and they have been greatly diminished since on account of the reduction of the stock caused by the attachment and mortgage, and the consequent loss of credit. The suit of the Union Paper Collar Company against the plaintiff is still pending and undecided, and the plaintiff has actually paid nothing as yet, on account of it, except as above stated, though he has become liable for counsel fees to a considerable amount." The court held the plaintiff entitled to recover damages, first, for the depreciation of his stock of goods, while necessarily withheld from sale by the attachment made on the writ in the suit for infringement

of the patent; second, for the reasonable debt contracted, though not paid, for the services of counsel in defending the suit; and third, for the reasonable expenses of himself and counsel incurred in relieving his stock from the attachment. And it was held that no damages were recoverable, first, for loss of probable profits during the time the plaintiff's stock was under the control of the attaching officer; second, the loss of probable net profits while the store remained closed in consequence of the plaintiff's illness contracted while trying to relieve the stock from the attachment; third, for the diminution of profits consequent upon the reduction of the stock; fourth, for the prospective damages arising from the loss of mercantile credit caused by the attachment; and fifth, for the expenses of the plaintiff and his counsel in procuring the defendants to enter into the bond in suit.¹

¹Ripley v. Moseley, 57 Me. 76. Burrows, J., said: "The language of the bond is general and comprehensive, and the plaintiff is entitled to recover all damages which he can legally be deemed to have suffered by reason of the suit, together with the expenses incurred in defending it, so far as they are found 'fair and reasonable;' these last being expressly provided for.

"We think that under the latter clause in the condition, the debt contracted by the plaintiff to counsel for services in defending the suit against him, *though not yet paid*, is a proper subject for allowance in making up the damages. The course pursued was undoubtedly contemplated by both parties. The defendants do not appear to have employed any counsel to defend the suit; and they bound themselves to pay 'all just and reasonable charges for the expenses in defending.' Ripley was to be saved harmless, not only from any judgment that the Union Paper Collar Co. might recover against him for damages and costs, but also from

expense in defending the suit. He has not been saved harmless in the matter of these expenses, but has been forced to incur an indebtedness which the defendants should have provided means to discharge. . . Lyman v. Lull, 4 N. H. 495. . .

"Nor do we think it can be maintained that the depreciation of the plaintiff's stock, while it has been necessarily withheld from sale on account of the attachment, is not a legitimate subject of damages recoverable here. The attachment of the stock was a natural and common incident of the suit. The plaintiff did his best to procure its release, but was unable to effect it on any terms which permitted him to make sale of the goods. This depreciation is a matter capable of being definitely ascertained. The loss is neither speculative nor dependent upon contingencies, and is one of the natural and direct results of the suit. The plaintiff's stock has been taken from him. In the natural course of things, it is diminished in value by the lapse of time. It is a

If the indemnified party, for the cause indemnified against, suffers judgment and makes a payment upon it;¹ if his property becomes incumbered and he pays it off,² or is subjected to service or trouble, or any expense³ within the scope of the agreement, he may recover damages for the same.⁴ So if the

loss to him, as much as if a portion of it were sold.

“And we are of opinion that the reasonable expense of himself and counsel, incurred by the plaintiff in the effort to release his property from attachment, is also recoverable; but not that which was incurred for the purpose of procuring the defendants to enter into the contract of indemnity.

“And with regard to all the other items which go to make up the damages assessed, we think them either too remote and uncertain, or too much complicated with other intervening efficient causes to be allowed in this suit.

“They do not seem to us to be either the direct and natural consequences of the suit, or to be such losses as may reasonably be supposed to have been in the contemplation of both parties at the time the agreement was entered into. No small part of them accrued by reason of other efficient proximate causes, the force and effect of which cannot be estimated; nor can the damages accruing from the combination be apportioned.

“The object of the bond was to reimburse the plaintiff for so much property as should be taken from him by reason of the suit and for the expenses of defending it. It cannot be so extended as to relieve the plaintiff from all the consequences of his unfortunate or unwise management since, though he may have fallen into the mistakes or met with the misfortunes in con-

sequence of the suit operating as a remote cause.

“But the damages thence resulting are consequences of consequences, and not legally computable. Very manifestly, if there were no other element of uncertainty, this should prevent the allowance made for loss of probable profits during the time the store remained closed in consequence of the plaintiff's illness contracted on his return from New York; for the diminution of profits consequent upon the reduction of his stock; and for the speculative damages arising from loss of mercantile credit. Much of the reasoning in *Haden v. Cabot*, 17 Mass. 169, is applicable in this case.”

¹ *Valentine v. Wheeler*, 116 Mass. 478; *White v. French*, 15 Gray, 339; *Moule v. Garret*, 41 L. J. Exch. 62; L. R. 7 Ex. 101; *Wallace v. Gilchrist*, 24 U. C. C. P. 40; *Green v. Brookins*, 23 Mich. 48; *Anthony v. Percifull*, 8 Ark. 474; *Brooklyn v. Brooklyn R. R. Co.* 57 Barb. 497; *Holdgate v. Clark*, 10 Wend. 216.

² *Webb v. Pond*, 19 Wend. 423; *Smith v. Compton*, 3 B. & Ad. 407.

³ *Nutt v. Merrill*, 40 Me. 237; *Jarvis v. Sewall*, 40 Barb. 449; *Lyman v. Lull*, 4 N. H. 495; *French v. Parish*, 14 N. H. 497; *Smith v. Compton*, 3 B. & Ad. 407; *Fisher v. Fallows*, 5 Esp. 171; *Mott v. Hicks*, 1 Cow. 513; *Short v. Kolloway*, 11 A. & E. 28; *Orr v. Bigelow*, 20 Barb. 21; *Trustees of Newburgh v. Galatian*, 4 Cow. 340.

⁴ In *Scott v. Tyler*, 14 Barb. 202, the bond sued on recited that an ex-

party lose property by breach of the agreement to indemnify,¹ he will be entitled, among other damages, to recover its value.

The extent of recovery upon an express indemnity is not affected by the fact that other parties than the indemnitor shared the benefits of the act indemnified against. Thus, a sheriff was put to expense and costs, covered by a bond of indemnity, in a successful defense of an action brought against him by a claimant of goods attached; and it was held that he was entitled to recover the whole amount upon the bond, and not merely a proportional part, though other creditors who did not indemnify him received the surplus proceeds after satisfying the indemnifying creditor.² The term "damages, costs and expenses," in a covenant of indemnity against the payment of a demand, does not cover a premium or bonus which the party is compelled to pay to raise the amount of the demand.³

BETWEEN WHAT WRONGDOERS THERE MAY BE CONTRIBUTION OR INDEMNITY.— Though it is a well settled principle that there is

execution had been placed in the hands of the obligee, the plaintiff. As sheriff, and by virtue of it, his deputy had levied on certain goods and chattels, claimed by one Disbrow, who was not the execution debtor, and who had replevied the same from the plaintiff, and that action was pending, and the condition was that in case the plaintiff should defend that suit, then if the obligors should indemnify and save harmless the obligee from "all costs, charges and expenses which he shall incur in defending," the obligation to be void. It was held to be the intention of the parties to limit the obligation to the expenses of the defense, strictly, and that the damages and costs recovered by Disbrow were not embraced. The plaintiff incurred costs and expenses which he had assumed to pay, but had not paid, amounting to \$112.25. This was also disallowed, because it had not been paid. Strong, J., said: "If

the obligation of the defendants is to indemnify and save the plaintiff harmless from *charge* or *liability*, he is entitled to recover to the extent of the charges of his attorneys, his liability therefor being established; but, if it is to indemnify and save harmless from loss or expenses, he must fail, no loss or expense within the terms of the bond being proved." This decision on this point covers debatable ground; and there is an irreconcilable conflict in the cases relating to it. It is believed that there is a preponderance of authority against the above ruling, not only in cases of indemnity, but other cases where expenses constitute an item of damages.

¹Sanders v. Hamilton, Mart. & Hayw. 458; Ackerman v. King, 29 Tex. 291; Crump v. Picklin, 1 Pat. & Heath (Va.), 201.

²Chamberlain v. Beller, 18 N. Y. 115.

³Low v. Archer, 12 N. Y. 277.

no contribution or indemnity between wrongdoers, this principle does not apply where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of the law;¹ or where the object is apparently in furtherance of justice, and in the exercise of a right, and the means are not in themselves criminal, and not known to the person employed to be wrongful to a third person.² A promise to indemnify another for committing a wilful and wicked trespass is not binding; but a contract to save harmless one who, from good motives, did an act for his employer which, contrary to his expectation, happened to be an injury to a third person, will be enforced; and any amount which may be recovered by the injured party from such employer, he may recover back on the indemnity.³

CONTRACTS VARYING FROM INDEMNITY, BUT INTENDED FOR THAT PURPOSE.—Contracts are often made, the general purpose of which is indemnity, but which are not merely to save harmless, or to indemnify against damages, but provide against the cause of damage; they are contracts for the prevention of damage. Of this nature are contracts to indemnify against the bringing of actions, or the existence of debts or liabilities, or the occurrence of particular facts from which injury is apprehended. Such contracts may relate to existing actions, debts and liabilities, and require their discontinuance or discharge; or they may relate to the preservation of the rights of the indemnified party, and be intended to indemnify or save him harmless by restraining acts which would impair or destroy such rights.

It is held in England and in the upper Canadian province, that where the undertaking is to save harmless, or protect against all actions, or debts which the promisee may become liable to pay, the consequence follows, that, where judgment has been obtained against him in such action, or upon any such debt or liability, he is entitled to recover the whole amount of the judgment against the covenantor, although he may not himself

¹ *Spalding v. Oakes*, 43 Vt. 343.

² *Ives v. Jones*, 3 Ired. 538; *Miller v. Rhoades*, 20 Ohio St. 494; *Stone v. Hooker*, 9 Cow. 154; *Brooklyn v.*

Brooklyn City R. R. Co. 47 N. Y.

475; *Hamden v. New Haven, etc. Co.* 27 Conn. 158.

³ *Id.*

have paid the debt or any part of it.¹ But the rule supported by the greater number of cases in our courts, and which most accords with the sound principle of allowing compensation only for actual loss, as well as limiting the damages to the extent of the breach of contract, is that where the contract is to save harmless from actions, debts, costs and expenses, it is a mere indemnity against damages; and there is no cause of action until damages are suffered, and then the recovery is limited to them.² It has been held, however, in some American cases, that a covenant to save harmless from all suits is broken by the commencement of a suit;³ that when a covenant is made to indemnify against a debt or duty which may accrue in the future, a liability to suit is a breach, and recovery may be had to the extent of the debt or duty to which the indemnity applies,⁴ or as ascertained by a judgment, though no part of it has been paid, nor any actual injury suffered.⁵

Where the contract is more than for indemnity against damages; where a party stipulates against the doing of certain acts, or the existence of certain conditions, or for payment or performance of any kind, then damages are not the gist of the action, and the value of performance of the contract will measure the damages recoverable for the breach. Thus, for example, a contract to pay a debt, or to discharge a liability, then existing, no time being specified, is a promise to pay it when due, or forthwith or within a reasonable time, if already

¹ *Smith v. Teer*, 21 U. C. Q. B. 412; *Spence v. Hector*, 24 U. C. Q. B. 277; *Loosemore v. Radford*, 9 M. & W. 657; *Warwick v. Richardson*, 10 M. & W. 284; *Carr v. Roberts*, 5 B. & Ad. 78; *Smith v. Howell*, 6 Exch. 739.

² *Aberdeen v. Blackmar*, 6 Hill, 324; *Crippin v. Thompson*, 6 Barb. 532; *Lott v. Mitchell*, 32 Cal. 23; *Donely v. Rockefeller*, 4 Cow. 253; *Hussey v. Collins*, 30 Me. 190; *Coe v. Rankin*, 5 McLean, 354; *Conner v. Bean*, 43 N. H. 202; *Douglass v. Clark*, 14 John. 177; *Churchill v. Moore*, 15 Kan. 255; *Jeffers v. John-*

son, 21 N. J. L. 73; *McDonald v. Bauskett*, 10 Rich. 178.

³ *Wilson's Adm'r v. Bowens*, 2 T. B. Mon. 86.

⁴ *Robertson v. Morgan's Adm'r*, 3 B. Mon. 307; *Chace v. Hinman*, 6 Wend. 452; *Rockefeller v. Conolly*, 8 Cow. 623.

⁵ *Carman v. Noble*, 9 Pa. St. 366; *Fish v. Dana*, 10 Mass. 46; *Webb v. Pond*, 19 Wend. 423; *Gilbert v. Wiman*, 1 N. Y. 550; *Jones v. Childs*, 8 Nev. 121; *In re Negus*, 7 Wend. 499; *Kirksey v. Friend*, 48 Ala. 276; *Conkey v. Hopkins*, 17 John. 113; *Jarvis v. Sewall*, 40 Barb. 449.

due.¹ The promisee, for breach of such a contract, is entitled to recover the amount of the debt and interest, though he has not paid it, or any part of it, if it is a debt the discharge of which would be beneficial to him.²

¹ *Furnas v. Durgin*, 119 Mass. 500; *Lathrop v. Atwood*, 21 Conn. 117; *Wilson v. Stillwell*, 9 Ohio St. 468; *Gilbert v. Wiman*, 1 N. Y. 550.

² *Id.*; *Jeffers v. Johnson*, 21 N. J. L. 73; *Dayton v. Gunnison*, 9 Pa. St. 347; *Wilson v. Stillwell*, 9 Ohio St. 468; *Kettle v. Lipe*, 6 Barb. 467; *Raymond v. Cooper*, 8 Upp. Can. C. P. 388; *Braman v. Dowse*, 12 Cush. 227; *Churchill v. Hunt*, 3 Denio, 321; *Nutt v. Merrill*, 40 Me. 237; *Dye v. Mann*, 10 Mich. 291; *Hall v. Nash*, 10 Mich. 303; *Dorsey v. Dashiell*, 1 Md. 198; *Conkey v. Hopkins*, 17 John. 113; *Kip v. Brigham*, 7 John. 168; *Sprague v. Seymour*, 15 John. 474; *Fish v. Dana*, 10 Mass. 46; *Gilbert v. Wiman*, 1 N. Y. 550; *Thomas v. Allen*, 1 Hill, 146; *Lathrop v. Atwood*, 21 Conn. 117; *Ketcham v. Jauncey*, 23 Conn. 123; *Merriam v. Pine City* L. Co. 23 Minn. 314; *Gage v. Lewis*, 68 Ill. 604. In *Gilbert v. Wiman*, *supra*, *Pratt, J.*, said: "Perhaps there is no branch of law concerning which the decisions of our courts have been more fluctuating than in relation to damages, especially in relation to the damages arising upon contracts in the nature of contracts of indemnity. According to strict legal principles, a court of law, it would seem, should only give actual compensation for actual loss; and such is the rule in relation to contracts of indemnity against damages merely. *Aberdeen v. Blackman*, 6 Hill, 324; *Jackson v. Post*, 17 John. 482. . . .

"But in personal contracts, when the instrument deviates the least

from a simple contract to indemnify against damages, even where indemnity is the sole object of the contract, and where in consequence of the primary liability of other persons actual loss may be sustained, the decisions of our courts, although by no means uniform, have gradually inclined towards fixing the rule to be one of actual compensation for probable loss; so that in contracts of that character it may now be considered a general rule, both in this country and in England. *Thomas v. Allen*, 1 Hill, 146; *Holmes v. Rhodes*, 1 B. & P. 638; *Hodge v. Bell*, 7 T. R. 93; *Post v. Jackson*, 17 John. 239. For instance, in an action on a covenant that a bond or other debt upon which a covenantee is liable shall be paid when due, or on a day certain, it has been long settled that the plaintiff may recover the full amount of his liability, although it is evident, from the terms of the contract, that it was intended merely as an indemnity, and although the parties primarily liable are abundantly able to pay. *Mann v. Eckford's Ex'rs*, 15 Wend. 502; *Ex parte Negus*, 7 id. 499; 7 T. R. 97; 2 M. R. 181. Indeed, the late supreme court have gone so far in some recent cases as to allow a full recovery when it did not appear that the plaintiff was liable at all, or could be injured by a breach of the contract; the court deciding that they had a right to infer that the plaintiff had some interest in having the debt discharged, or he would not have made the contract. *Thomas*

The amount of the debt agreed to be paid is not the measure of damages if the promisee is not liable for the debt assumed, and cannot gain by its payment, nor be prejudiced by its non-payment. Where a party owning land which is subject to a mortgage, for the payment of which he is not personally bound, sells and conveys such land subject to the mortgage, and the grantee engages to pay it, this agreement is construed as a mere declaration that the property was conveyed to him, subject to the lien of the mortgage thereon, and that the general covenants of seizin and warranty, in the conveyance, are not intended to extend to this particular incumbrance, of which the grantee assumed the payment, in case he should wish to retain the title of the land conveyed to him.¹ Such a grantor, to whom the promise to pay such a mortgage is made, having no interest in the payment of the mortgage beyond the effect of such payment on the covenants for title, the agreement is construed to accomplish what such facts indicate was the intention of the parties; and is restricted to secure the promisee just the benefit which would accrue to him from the payment agreed to be made — exemption as to that debt from liability on those covenants. If, however, the grantor of lands, burdened with an incumbrance, is personally liable for the debt so secured, and the grantee agrees to pay it, then an actual discharge of that debt is necessary to the grantor's indemnity; and then the agreement to pay it will be construed to intend his exoneration. In the former case, the failure of the grantee to pay the mortgage would be no actual injury to the grantor; but in the latter case it would; and he is allowed to recover damages measured by the amount of the debt. In that case the mortgagor may,

v. Allen, 1 Hill, 146; Tyler v. Ives, MS. Sup. Court, 1839. That the plaintiff had some interest in such a case would be probable; but that he had an interest to the full amount of the original indebtedness, in the absence of proof, seems to be rather a violent presumption; such, however is the effect of these decisions. In the last case cited above, Ives covenanted with Tyler that Raynor

should pay up and discharge a bond and mortgage upon certain lands. There was no evidence to show that Tyler had any interest in the lands, or in the discharge of the bond and mortgage, or was in any manner liable upon the same; yet the court held that he was entitled to recover the full amount of the bond."

¹ Halsey v. Reed, 9 Paige, 446; Trotter v. Hughes, 12 N. Y. 74.

by subrogation in equity, also enforce the obligation in his own favor.¹

The recovery of damages to the amount of the debt by the promisee who has not paid it, but is only liable for it, or has a beneficial interest in having it paid, has sometimes been referred to as compensation allowed for only probable injury. It is not such in any just sense. Such agreements must have a consideration; the promisor, in contemplation of law, has received such value that it is a just and legal duty he has assumed to pay the debt, and the benefit of its cancellation by payment to the promisee equal to its amount; and by necessary consequence, its non-payment is a legal detriment and injury to the same amount.

The sale of land subject to a mortgage for which the seller is liable, and which the buyer agrees to pay, is an apt illustration. An owner of land sells it; he owes a debt which is secured on the land. If he gets the full value of the land he can pay off the debt and discharge the incumbrance at once. He is then exonerated from that debt; his creditor has his dues, and the purchaser has only paid for the land. On the other hand, if the seller leaves so much of the purchase money in the hands of the buyer as is equal to the incumbrance, on such buyer's agreement to pay the debt, so long as the buyer retains the money after the debt is due, he retains money, equal in amount, due for the land, and which he had agreed with the seller to pay for his benefit. In the same sense, whenever one undertakes by an original agreement to pay another's debt, the latter suffers the injury at once when a default in making the payment occurs. The damages are to be estimated not exceptionally, but on the general principle of allowing the injured party compensation equal to the benefit he would derive from performance. It has been suggested that in such a case the promisee may never be compelled to pay the debt; that is not the proper test of injury to him. After such a contract he has a right to have his debt paid; and to be morally and legally exonerated by payment; not merely to be indemnified in a perpetual de-

¹ *Trotter v. Hughes*, *supra*; *Halsey v. Reed*, *supra*; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Rawson's Adm'r v. Copeland*, 2 Sandf. Ch. 251.

linquency to his creditor. Trover will lie by a maker for conversion of his note which he has paid, or a note tortiously diverted from the use for which it was made.¹ In such a case it is equally true that the maker may never be called on to pay the note; but that consideration does not prevent a recovery for the face of the note where the maker is exposed to injury to that amount.

Courts of law are not adapted like courts of equity to do complete justice to all parties interested in such cases; that is, to protect the defaulting party by requiring the money so recovered to be applied to the debt, though its payment may be important to him. This, however, has been done in some cases.²

¹ Decker v. Mathews, 12 N. Y. 313.
Buck v. Kent, 3 Vt. 99; Park v. Mc-
Daniels, 37 Vt. 594; Pierce v. Gilson,
9 Vt. 216; Spencer v. Dearth, 43 Vt.
98; Stone v. Clough, 41 N. H. 290;

Neal v. Hanson, 60 Me. 84; Otisfield
v. Mayberry, 63 Me. 197.

² Martin v. Franklin F. Ins. Co. 38
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